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SELECTED CASES

ON THE

LAW OF CONTRACTS

WITH ANNOTATIONS

SECOND EDITION

BY

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Durham, N. C. (1904-1910)

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Preface to First Edition.

To present any subject of the law by means of cases, is only to follow out the idea of Lord Coke, that "the reporting of particular cases is the most perspicuous course of teaching the right rule and reason of law"; but in studying the law by such cases, the caution of Lord Mansfield is to be observed, that "the law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases." This book has been prepared for the purpose of presenting the general principles of the Law of Contracts, by the study of selected cases, which illustrate and explain different parts of that subject.

The cases selected, with one exception, have been taken from the decisions of the Supreme Court of North Carolina. This course has its disadvantage, no doubt, in that perhaps a greater variety of fact and discussion might have been obtained by taking other American or English cases, but it has its advantage, in that it gives a connected view of the whole subject in one jurisdiction. It is not intended to give the law of one jurisdiction exclusively, for it will be found that the principles of the Law of Contract are the same in all the States which have adopted the common law, and even the statutory changes are similar in many respects. While the student is learning the general law of the subject, he is, at the same time, becoming thoroughly familiar with the decisions of his own State, or of a court which has always met with the highest consideration. This court has been in existence for a century, and almost every important question in the Law of Contracts has come before it in some form for discussion. Its judges have been men of approved learning and ability. Its views have always been conservative; and perhaps in no other State have the principles of the common law been more closely observed.

There has been no attempt at originality of arrangement, in a subject which has been often discussed; but the cases have been selected to illustrate the general subjects usually presented in the leading text-books on contracts, and frequent references to authorities are given in the notes. The Contracts of Married Women and of Corporations, especially Municipal Corporations in North Carolina, are explained somewhat in detail, while the subjects of Bailment, Sales, Agency and Quasi Contracts are treated only in connection with other forms of contract. In each case the facts have been given in such a way as to show clearly and briefly

the question decided, and this has been done either in the words of the original report or by condensation, if necessary. In the opinions themselves no change has been made, except that in cases where several questions have been discussed, only that portion is given which is concerned with the question of contract involved; and in some instances, quotations from other cases, which are only corroborative of the main argument, are omitted and the cases referred to and omission noted.

Following the cases on each subject are notes giving other cases in which the same question has arisen or connected subjects are discussed and also references to general authorities, where a more extended investigation may be made with little additional trouble. Where there is any material difference in the view held by other courts, attention is called to it in the notes, and references given where the difference may be examined. The book may be used alone or in connection with any elementary text-book on contracts.

While advantage to the student has been mainly kept in view in the preparation of the book, the number and variety of the cases, and the references given in the notes will render it of material advantage to the lawyer in active practice.

A. C. McINTOSH.

Trinity College, Durham, N. C.
September, 1908.

Preface to Second Edition.

The first edition of this book was compiled almost entirely from decisions of the North Carolina Supreme Court, and was published as one of a series of Law Books gotten out by the Law Department of Trinity College. In the second edition the plan is substantially the same, in that most of the cases formerly used have been retained; but where more recent North Carolina decisions have presented the subject more clearly, they have been added to or substituted for the older cases. In some instances, where no suitable case could be found in the local decisions, cases have been selected from other jurisdictions in order to present the subject more fully. The notes have been revised and additional citations given from local and general authorities, so that a more complete investigation of each subject may be easily made.

A. C. M.

November, 1915.

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Synopsis.

[The figures refer to the number of the case unless otherwise indicated.]

A Contract

"A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing." In the ordinary form it consists of an agreement, a consideration, and a thing to be done (1).

An Agreement

An *agreement* is the meeting of the minds in a common intention, and it implies two or more parties. A person can not make a contract with himself, even in a representative capacity, because there is only one mind acting, and in the enforcement of such obligations he would be both plaintiff and defendant in the same action. "It takes two to make a bargain" (2, 3). But a note or bond payable to the maker may become a contract by endorsement to another person (3). The common intention is that upon which the minds of the parties meet. They must have consented to the same subject-matter in the same sense, and if there is no such mutual assent, there is no agreement (4). The contract is not what either party thought, but what both agreed (5).

Contracts Executed or Executory

The contract may be executed, where both parties have done all that they were required to do; or executory, where something is still to be done by one or both parties. A void contract is one that has no legal effect, a mere nullity; a voidable contract is one that is valid until it is set aside at the will of one of the parties; an unenforceable contract is one that can not be enforced because of some legal defect (p. 10).

Manner of Agreement

The *manner of agreement* may be by express contract, where the parties have definitely fixed the terms, either orally or in writing (6); or by implied contract, where the agreement is inferred as a fact from the conduct of the parties. Where one person performs service for another, for which one might reasonably expect to be paid, and the other knowingly accepts such service, there is an implied obligation to pay what the service is reasonably worth; but if the other party has no

opportunity to accept or reject, or it was understood that the service was gratuitous, there is no obligation to pay (7, 8). The relation of the parties may be such as to rebut the inference of a promise to pay, as between parent and child or others living in the "one family" relation (9). The contract may also be implied in law, as where one receives money which belongs to another, or is compelled to do some act for which the other was liable, the law imposes the obligation to pay, to prevent injustice. This is called a constructive or quasi contract, because it is enforced by an action *ex contractu*, though consent is wanting (10, 11).

Offer and Acceptance

The agreement of the parties resulting in contract may generally be reduced to an *offer* and *acceptance*. The offer expresses the intention or willingness to be bound, and the acceptance makes the obligation complete, changes the offer into a promise. The offer must be in such form that upon acceptance the terms of the agreement are definitely fixed (12). The *offer* must be *communicated* to the other party before he can accept it (13); it must be brought to his attention actually or constructively, so that he may know its terms. This may be by direct notice, or by some writing which the party accepts, or by circumstances which would reasonably lead to knowledge of the terms. A bill of lading, an express receipt, a telegraph blank, a passenger ticket at a special rate, may bind the holder by terms which he failed to read, since by accepting them the contract is complete; but the ordinary passenger ticket at the regular fare is not a contract in itself, being only in the nature of a receipt or token of payment (14, 15).

There must be an *acceptance* of the offer, and this acceptance must be communicated (16). An intention to accept, not made known to the other party, is no acceptance (17). Whether direct notice of acceptance must be given, or merely doing the act indicated will be sufficient, will depend upon the nature of the offer. In an absolute *guaranty*, or guaranty of payment, no notice of acceptance is required, while in a conditional guaranty, or guaranty of collection, such notice is necessary (18). If the parties are at a distance from each other, an offer by mail or telegraph is a continuing offer until it is received, and the mailing or sending the message of acceptance completes the contract, unless it is otherwise specified in the offer (19, 20). The acceptance must be in the manner indicated in the offer. Where the offer indicates that the other person shall promise something, notice of acceptance is required; but where it indicates that the other shall do some act, doing the act may

be sufficient (21). The acceptance must be identical with the terms of the offer, absolute and unconditional, in the manner and at the time and place required (22). If a person retains goods or money sent to him upon condition, it is an acceptance of the condition (23).

Offer may be Revoked

An *offer* may be *revoked* at any time before, but not after, acceptance. An offer under seal is said to be irrevocable, because it is a deed, a thing done, and the assent of the other party is presumed until it is rejected (24). In an *option*, which is a continuing offer, if the acceptance is within the time specified, the contract is complete, unless the offer has been withdrawn; if the option is based upon a consideration, it can not be withdrawn, but is binding until the time expires. Timber contracts for cutting and removing timber within a certain time are in the nature of options, and the purchaser must exercise his right within the time specified. A lease with an option to purchase, can not be revoked during the term (25). In a broker's contract for sale, his right to commissions depends upon his success in effecting a sale before his power has been revoked by the owner in good faith (26). To be effective the revocation of an offer must be communicated, where express revocation is necessary (19); the offer may also *lapse* by failure to accept within the time specified or within a reasonable time, or by a qualified acceptance or rejection, or by the death or insanity of either party before acceptance (17, 19, 20, 27, p. 59).

Rewards and Auctions

Offers may be made to the public instead of to a particular individual, as in the case of *rewards* and *auctions*. In the case of *rewards* the person performing the service is entitled to the reward, provided he knew of the offer, though it is also held that such knowledge is immaterial. An officer whose duty it is to perform the service can not claim the reward, unless authorized by statute. The offer of reward may be revoked at any time by notice in the same way the offer was made, or by the lapse of time (28).

In *auctions*, the property is exposed to sale as an invitation to deal, the bid is an offer to buy, and it is accepted and the contract is complete when the hammer falls. Before the hammer falls, the property may be withdrawn, or the bidder may withdraw his bid. In sales under an order of court, the accepted bidder acquires no rights until the sale is confirmed by the court. The auctioneer is the agent of seller and bidder to bind them to the sale. If the bidder fails to

comply with his bid, he may be sued for the price, or a new sale may be had and he may be held for the difference (29).

Agreement Complete and Definite

The offer and acceptance must be intended to affect the *legal relations* of the parties, and acts which are done out of charity or benevolence, or which concern social relations alone, can not create contract obligations (30). If there is only *pretended consent*, as where the parties go through the form in jest or as a sham, with no intention of being bound, there is no contract (31). The agreement must be *complete*, and the terms *definite* and *certain*. If the offer is in the nature of an advertisement, notice, or *invitation to deal*, acceptance does not make the contract. In public contracts to the lowest bidder, there is generally the discretion to reject any bid (32). If the parties have not completed their agreement, there is no contract; as, where they fix a time and place to complete their agreement, and this is not done (33); but the mere intention to reduce their agreement to writing does not render the contract incomplete, if the parties intended to be bound by the terms and the writing was to be only the means of preserving or proving the agreement (34). When a writing is signed upon a condition which is not complied with, there is no contract as between the parties, though the rights of innocent third persons might be protected (34, 215, 216). If the terms of the agreement are too uncertain and indefinite for the court to ascertain the meaning, there is no contract; the court can not guess at the meaning. If the terms refer to something by which they may be rendered definite, that will be sufficient under the maxim *id certum est quod certum reddi potest* (35).

Classification of Contracts

Contracts are classified, in regard to form, into Contracts of Record; Contracts under Seal, or Specialties; and Simple or Parol Contracts, which may be either oral or written. Contracts of Record are Judgments and Recognizances. *Judgments* are contracts only in a limited sense; they are assignable, and may be sued on in an action *ex contractu*, being quasi-contractual in nature; but they are not negotiable, and are not extended nor revived by a payment or a new promise in writing. The manner of entering and enforcing judgments is regulated by statute, and when properly rendered, they operate as an estoppel or *res judicata*, and merge lower forms of contract (36, 264). *Recognizances* are obligations acknowledged of record, and generally bind the parties to three things: To appear and answer a specific charge; to abide the order of the court; and not depart the court without leave. Upon breach

they are enforced by judgment nisi, sci. fa., and judgment absolute (37).

Contracts under Seal

Contracts under seal are called specialties, deeds or bonds, and the seal is the distinguishing characteristic. They derived their effect and importance from the formality and the deliberation implied in their execution. A *deed* is a writing, signed, sealed and delivered. A *bond* is the acknowledgment of a debt under seal. There must be a grantor and a grantee, an obligor and an obligee, and a thing granted or sum to be paid. A deed must be complete and executed by the grantor or by an agent authorized under seal (38, 39). A consideration is not required in sealed contracts at law, but in equity a consideration is necessary, or if the consideration is illegal it may render the contract void (40, 71). The deed may be *signed* by the party himself, by another for him in his presence, or by agent with authority under seal. The signature may be in the body of the deed or at the end, and may be either the full name, the initials, or by mark. If the deed is signed by one whose name does not appear in the instrument, it is not binding, unless there is enough in the instrument to indicate its character and effect as to him. In the formal execution, an indenture was a deed executed in as many parts as there were parties, while a deed poll was signed by the grantor alone and made binding upon the grantee by acceptance (41, 42). *Sealing* was formerly an impression upon wax, but it is now generally a mark or scrawl used to indicate the presence of a seal. Whether there is a seal is a question of fact, whether it is sufficient is a question of law. Two persons may adopt the same seal, but one partner can not bind the firm under seal in contracts requiring the use of a seal. The recital in the instrument that it is under seal, when in fact none is used, is insufficient; and in some States the use of a seal without such recital is insufficient. In many States the necessity and effect of a seal have been modified or abolished by statute (38, 43).

Delivery of Deed

Delivery of a deed is the parting with the possession of it by the grantor to the grantee, or to someone for the grantee, so as to place it beyond the control of the grantor (44). There is no set form necessary; any words or acts which show the intention will be sufficient, provided there is the parting with the control over the instrument by the grantor. If the deed is delivered to the grantee or to his agent for that purpose, it is complete; if delivered to a third person for the benefit of the grantee, it is valid until rejected; if delivered to a third person for

the grantor, it is no delivery. Possession of the deed by the grantee, or probate and registration, will be *prima facie* evidence of delivery (45, 46). Delivery vests the title in the grantee, and the grantor can not recall it; but a deed may be surrendered before registration, if there is no fraud, or the rights of third persons have not intervened; a married woman, however, should reconvey (44, 46). *Attestation* is not necessary, though the execution must be acknowledged or proved; and if signed by a witness, it may be by mark, initials, or in any way to be identified (41, 46, p. 103). A *date* is not necessary, since the deed takes effect from delivery, and it is presumed to have been delivered at the date given in the deed (p. 103). *Acceptance* by the grantee is required but since it is for his benefit, acceptance is presumed until the contrary is shown. If rejected, a new delivery is required (45, p. 103). An *escrow* is a deed delivered to a third person, to be given to the grantee upon some condition. It takes effect from the first delivery, unless there is a clear intention to the contrary; but a delivery to the grantee is not an escrow. If an instrument is signed by one obligor, to be valid when signed by others, and it is delivered to the obligee without such signatures, it is valid, if the obligee did not know of such condition (47).

Registration of Deed

Registration of a deed is not necessary between the parties, but it is necessary as against the claims of creditors and purchasers (p. 107). Bonds were not *negotiable* until made so by statute, and even then they required endorsement, but now the seal does not affect negotiability (45, p. 108). The *effect* of a deed is to estop the grantor and those claiming under him, and the grantee by acceptance is bound by the terms of the deed. Recitals in a deed are conclusive when of the essence of the contract, but the recital of the payment of consideration may be contradicted. A deed also merges lower forms of contract (pp. 108, 109).

Statute of Frauds

Simple or parol contracts are either oral or written, this merely affecting the method of proof; but by the statute of frauds certain contracts are required to be in writing. The English Statute of Frauds, 29 Chas. II., contained several sections, those particularly affecting contracts being sections four and seventeen (p. 110). These have not been fully adopted in North Carolina. Section 4 contains the following contracts: 1. *A special promise by an executor or administrator to answer damages out of his own estate.* This must be in writing, and if based upon a sufficient consideration, as having assets, forbearance, etc., it will bind him personally, unless the liability is limited by express terms in the instrument (48, 49). 2. *A special promise to answer for the debt, de-*

fault or miscarriage of another. This must be in writing, and the new promise must be added to the original liability, which must continue. It does not apply to a promise substituted for the original promise; to a promise made to the debtor himself; to pay out of the debtor's property; a promise made for the advantage of the promisor; when credit is given to the promisor alone; or when the original debt is invalid. Contracts of guaranty generally come within the statute, while the decisions as to indemnity contracts are not uniform. In some States, a representation relating to the credit of another person must be in writing to bind the person making it (50, 51, 52).

Land Contracts

3. *Contracts to sell or convey land*, or any interest therein. This includes *any interest in land*, legal or equitable, easements, all leases for more than three years (in some States for more than one year), and all mining leases (53, 54). *Growing trees, fructus naturales*, are considered a part of the realty (55); *growing crops, fructus industriales*, are considered as personalty; the latter if unsevered are presumed to pass with the land, but may be excepted by parol (56). The statute does not apply to agreements for money arising out of land contracts; as, for partnership agreements, for services in selling land, to pay for deficiency in acres, part of the proceeds of sale, etc. A contract for land may be rescinded by parol, but such rescission must be acted upon by the parties (57, p. 138).

In Consideration of Marriage

4. *Contracts in consideration of marriage* must be in writing. This does not include mere promises of marriage, but applies to contracts affecting property rights based upon the consideration of marriage. This section is not in force in North Carolina, and hence such contracts may be oral except when they come under some other section, as for land (58). 5. *Contracts not to be performed within a year* must be in writing. This includes only those contracts which by a fair and reasonable interpretation do not admit of performance within a year from the time they were made. This has not been adopted in North Carolina (59).

Goods, Wares, Merchandise Contracts

Section 17 of the English statute provides that contracts for the *sale of goods, wares and merchandise* for £10 or upwards must be in writing unless the buyer accept and receive part of the goods, or give something in earnest to bind the bargain or in part payment. If the contract is for goods manufactured for sale generally, it is within the statute, but if the goods are to be made for the purchaser specially, it is not within the statute. This section has not been adopted in North Carolina (60).

Statute of Frauds, Requirements and Effect

The *statute of frauds requires* the contract, or some memorandum thereof, to be in writing and signed by the party to be charged therewith, or by some other person by him lawfully authorized thereto. The writing should show the parties, the subject-matter, the terms, and be signed by the party to be charged therewith, that is, the defendant in an action to enforce it. It may be signed anywhere in the writing, and if by agent, his authority need not be in writing. A consideration is necessary to the contract, and most courts require that it should appear in the writing, but it is otherwise in North Carolina. If there are several papers, they must be connected or refer to each other in some way. Since the writing is only evidence that the contract was made, neither sealing, delivery, nor registration is required (61, 62). If the statute has not been complied with, it renders the contract voidable at the option of the defendant. If the statute is not pleaded and the defendant submits to perform the contract, the court will enforce it; if the defendant denies the contract, or sets up a different contract, or expressly pleads the statute, the plaintiff can not proceed because the writing is the only admissible evidence. The vendor, if bound orally, may repudiate when sued or may sue for the land; the vendee, if bound orally, may repudiate when sued, but he can not sue for the money paid when the vendor is bound or is willing to perform the contract. Strangers to the contract can not take advantage of the statute. Under the equitable doctrine of part performance, the contract may be specifically enforced as if it were in writing; but this has not been accepted in North Carolina, and the vendor may recover the land, subject to payment for improvements placed on it by the purchaser. The statute of frauds does not apply to executed contracts, nor to obligations created by law (63, 64, 65, pp. 157-159).

Consideration Necessary

A *consideration* is necessary to support a simple contract; it must be a valuable consideration; without this, the contract is a *nudum pactum*. A valuable consideration is some benefit or advantage to the promisor, or some detriment or disadvantage to the promisee. It is that which passes from the promisee to the promisor in return for his promise, and the detriment or loss to the promisee is the important part. It is not necessary that the promisor be benefited, if the promisee has parted with some right which he may lawfully exercise (66). The consideration is to be distinguished from the motive or purpose in view in making the contract (67). Neither a good consideration, based upon love and affection, nor a moral obligation will be sufficient to support a

contract (68, 69). Contracts under seal, on account of their form, do not require a consideration, except where equitable relief is sought, and in contracts in restraint of trade (40, 70, 71). In negotiable instruments a valuable consideration is presumed, but the contrary may be shown except against a bona fide holder in due course (72). If the performance of a gratuitous act is undertaken and entered upon, the confidence reposed is a sufficient consideration to bind the party, but the mere promise to do a gratuitous act is not enforceable (73).

Sufficient Consideration

Inadequacy of consideration does not generally affect the contract, since the parties have the right to determine the value themselves; but inadequacy may be evidence of fraud or imposition, and it will also be considered in the exchange of values fixed by law (74). Various things have been held by the courts to constitute a sufficient consideration; as, marriage (75), mutual promises (76, 77), forbearance to exercise a right (80, 81), the compromise of doubtful claims (82). Contingent promises may not be sufficient for want of mutuality, as in contracts for the future delivery of personal property where the quantity is dependent upon the will, wish or want of one of the parties; these are valid, however, if the quantity to be furnished is ascertainable with reasonable certainty (78). Voluntary subscriptions have been sustained as upon sufficient consideration for various reasons, as upon mutual promises, benefits conferred, or expense incurred based upon these (79). A promise to do what one is already bound to do, either by agreement or by law, is no consideration for a promise to pay more, unless the parties have virtually rescinded their former contract (83, 84). At common law part payment of a fixed debt was no consideration for a promise to release the balance due, but it might sometimes be sustained as an accord and satisfaction, and it is now a satisfaction by statute if so intended (85). A promise to do an impossible thing, that which is practically impossible according to the state of knowledge at the time, is without consideration (86.) A promise that is too indefinite or uncertain for the court to know what is to be done, or a promise to do an unlawful act, is without consideration (35, 144). A past consideration is not sufficient unless it is based upon a previous request, express or implied, or upon some prior legal obligation which has been suspended by some rule of law (87, 88, 89).

Capacity to Contract

There must be *parties capable* of entering into contract relations and this will depend upon various circumstances determining the legal or personal capacity. The *United States* and the *State*

may make contracts for the purposes of government, through their properly authorized agents; and actions may be brought for the government by the proper officers, and against the government in the manner indicated by law. The different departments and institutions of the State are only agencies of government, and they may make contracts and sue and be sued only as authorized by statute (90, 91).

Corporations

Municipal corporations, as counties, cities, towns, etc., are also agencies of government, with special powers conferred upon them, and they may make contracts within such powers. They may contract for necessary expenses, as for roads, streets, public buildings, water, lights, etc., without further authority, but for other than necessary expense they must have the consent of the people by popular vote, and also legislative sanction in the manner required by the Constitution (92, 93). *Private corporations* are organized as the result of contract, and they may exercise only the powers conferred upon them by their charters (94, 95). They can contract only as a corporate body or through an agent authorized by corporate action; a contract made by the consent of the individual members, not in a corporate meeting, is not the contract of the corporation. The corporate seal is not necessary for a corporate act, except in contracts otherwise requiring a seal, but the use of the corporate seal implies the authority of the corporation for the act (96). That a contract is *ultra vires* will not defeat the liability of the corporation, if it has received the benefit or the other party has dealt with it to his injury, unless the contract is one expressly forbidden by law (97).

Contracts of Infants

The contract rights of *aliens* are fixed by statute, and these may be suspended as to alien enemies in time of war. *Attorneys* and *physicians* were formerly considered as exercising their skill only for the honor, but they may now contract for compensation. *Persons restrained in prison* do not thereby lose their right to make a contract (98). *Infants* are under disability to contract until they reach the age of twenty-one. At common law some of their contracts were considered void, some voidable, and others valid, while the modern tendency is to consider all their contracts voidable at the option of the infant. It is held that an infant may be an agent but he can not appoint an agent; or if too young to have understanding, his acts would be void (99). An infant is liable for necessities, unless living with the father or there is a guardian; and what are necessities will depend upon the circumstances of the infant, including such things as concern the care of himself and family, and not for the protection or improvement of his

property (100, 101). The infant may avoid his contracts as to personalty at any time; but as to realty, only after coming of age; and he may ratify his contracts after coming of age (102, 103, 104). Avoidance or ratification may be by word or act, but ratification of an executory contract requires an express promise or an unequivocal act, with the knowledge that he is not legally bound. The ratification or avoidance must be of the entire contract; and in case of avoidance, if he has the consideration received, the other party is entitled to it, but the infant is not liable for wasting it during infancy. He is not estopped by misrepresenting his age, nor is he liable for torts connected with his contracts (105, 106).

Contracts of Insane Persons

Insane persons may plead such disability to avoid a contract, but sanity is generally presumed until the contrary is shown (107). The test of capacity is that the person shall be able to understand what he is about (108). An inquisition of lunacy is sometimes held to be conclusive, but in North Carolina it is only presumptive evidence, except perhaps as to those directly connected with the inquisition. A marriage of a lunatic is voidable, and may be declared void *ab initio* by a decree of court (109). The liability for necessities is the same as that of infants, but it extends also to the care of property, and the existence of a guardian does not defeat it (110). Their contracts are voidable, as a rule; but where one has dealt with the lunatic in good faith, without knowledge of the disability, for a fair consideration, and no advantage is taken, he will be protected, and if the contract should be set aside the consideration must be restored (111). *Drunken persons* are in the same class as lunatics, so far as their contracts are concerned. If one is so drunk that he does not know what he is doing, his contract is void, or at any rate voidable for want of capacity; while if the other has taken advantage of an intoxicated condition to induce him to make the contract, it may be set aside for fraud (112).

Contracts of Married Women

Married women, at common law, could not make contracts that would be binding upon them except in special cases; in regard to their separate estate, which was the creature of equity, their contracts could be enforced by way of charge against such estate (113). Under the Constitution and statutes her property rights and powers of contract have been materially changed. Under the law in North Carolina before 1911, she could contract as a feme sole as a freetrader; she could dispose of her personalty by gift or executed contract; she could bind her separate personal estate without the consent of her husband, for necessary personal ex-

pense, for the support of the family, and to pay ante-nuptial debts; all other contracts affecting her personalty were with the written consent of the husband and charged her separate estate either expressly or by implication. Her contracts affecting realty were with the joinder of her husband, private examination, and charging the estate; and as to her equitable separate estate, her power was still further limited by the terms of the instrument creating it. She incurred no personal liability under a contract, except by statute; and she was not estopped by anything in the nature of contract, though she might be estopped by fraud to claim property under an alleged contract (114, pp. 289-292). Under the Act of 1911, there is no restriction as to her power to contract, except as to contracts made with her husband, and in conveyances of realty (115, pp. 289-292).

Mistake and Misrepresentation

The *real consent* of the parties to a contract may be wanting on account of Mistake, Misrepresentation, Fraud, Duress, or Undue Influence. *Mistake* is an erroneous impression of one or both parties as to some material part of the contract, and not arising out of fraud or negligence. The mistake may be in regard to the nature of the instrument signed (116, 117); or as to the identity of the person dealt with (118); or as to the identity or the existence of the subject-matter (119, 129). In these cases there would be no contract because the minds of the parties do not meet. If the mistake is in regard to the nature or quality of the subject-matter, where the party gets the article contracted for, it does not affect the contract, in the absence of fraud (121, 122). A mutual mistake as to a material part may be ground for rescission, or for correction of a written instrument where it does not properly express the terms of the agreement, unless the rights of third persons have intervened; but a unilateral mistake, in the absence of fraud or imposition, is not ground for relief (123, 124, 125). A mistake of law is not generally ground for relief, as where the parties execute the instrument intended but are mistaken as to its legal effect; but where there is fraud or circumstances of imposition equity will grant relief (126). *Misrepresentation* is an innocent misstatement, which does not affect the contract, unless it enters into it as a material term, or the parties stand in such relation that one must rely upon the other. A material term in the contract may be a condition upon which the contract may be avoided, or a warranty which, in the nature of a collateral agreement, may give rise to a cause of action for damages. In insurance contracts warranty is used in the sense of condition, and under the statute all statements in such contracts are considered representations and not warranties, and do

not affect the contract unless they are material or fraudulent (127, 128).

Fraud

Actual fraud is generally defined as a misrepresentation of a material fact, false within the knowledge of the party making it, reasonably relied on by the other party, intended to deceive, and which does deceive the other party to his injury. The rule *caveat emptor* applies if the means of information are equally open to both parties, unless inquiry is prevented by the act of the other party (129). Mere silence or nondisclosure may amount to fraud, when it is the duty of the party to speak, as in the case of latent defects (130). A material fact is one that would have prevented the contract, if it had been known (131); the present intention of the party may be such a material fact, but the opinion of a party as to value, etc., is not generally material unless the parties are in unequal positions (132, 133). The statement must be false within the knowledge of the party making it, that is, what he knows to be false or does not know to be true; this is called the *scienter* (134, 135). The statement must be reasonably relied on by the other party, that is, he must use reasonable care to protect himself, but it is held that the guilty party can not plead the negligence of the other as an excuse for his positive fraud (136). The statement must be intended to deceive and actually deceive the other to his injury. Fraud without damage, or damage without fraud, gives no cause of action (137). In the execution of written instruments, if the party is deceived and executes one different from the one intended, it is *fraud in the factum*, and will render the instrument void, if the maker has not been guilty of negligence; but if he executes the instrument intended, and is induced to do so by fraud, it is fraud in the inducement or treaty and the instrument will be valid until set aside for the fraud (138). Fraud, except in the *factum*, renders the contract voidable, and the injured party may have the choice of several remedies. He may repudiate the contract, tender back what he has received, and sue at law to recover what he has parted with; or he may affirm the contract, keep the property, and recover damages for the deceit; or he may wait until he is sued and set up the fraud as a defense or as a basis of a claim for damages; whether he may rescind and also set up a claim for damages will depend upon whether the rescission will place him in *statu quo*. In a proper case in equity, he may sue for rescission, cancellation or correction, or resist a suit for specific performance (139). Where the rights of innocent third persons intervene, they will be protected, upon the doctrine that where one of two innocent persons must suffer from the fraud of a third, the loss

will fall upon him who first reposed the confidence (140). *Constructive fraud* arises where the contract is between parties occupying a fiduciary relation, and it is presumed as a matter of law from this relation. Where the contract and this relation are shown, the burden is upon the fiduciary to show that he did not take advantage of his position; but if the relation is only that of friendly confidence, it is merely evidence of fraud, and the injured party must show the confidence reposed and abused (141).

Duress

Duress is the overcoming of the will of one party by violence, actual or threatened, by the other party, and may be either by imprisonment or by threats. If the imprisonment is without just cause, or if for a proper cause but for an improper purpose, a contract growing out of it may be avoided (142). In duress by threats the violence must be such as to overcome the will of the person, and this violence may be directed to the person himself, to his family or property. The contract induced by duress is generally voidable, and the injured party must proceed within a reasonable time after the force is removed (143). *Undue influence* results from the exercise of some control over the will of one party by the other, arising from some confidence reposed, or some advantage taken of his peculiar condition, and may render the contract voidable (p. 361).

Illegal Consideration or Purpose

The *thing to be done* in the contract must be *lawful*. If it is for an illegal consideration or for an illegal purpose, it is void, in the sense that the law will not aid either party to such agreement. The *illegality* may result from an agreement in violation of common law, as to commit a civil trespass; but where one employs another to do what he has an apparent right to do, and agrees to indemnify him against loss, such agreement is valid, although the act is a civil wrong (144). If the contract is intended to defraud a third person, the court will not enforce it (145). The illegality may result from the violation of a statute; as an agreement to settle an estate without letters of administration (146); to pay for the services of one not legally authorized to engage in a certain business (147, 148); a contract in violation of Sunday laws (149); or of usury laws, by charging more than the legal rate of interest, which under the statute results in a forfeiture of all interest and double the amount of interest paid (150). Wagers and gambling transactions are prohibited by law, and all contracts based upon these are void. These include all forms of betting on horse races, games of chance, etc. (151); insurance contracts where the person taking out the policy has no insurable interest in the subject-matter of the policy (152); deal-

ing in futures, where there is no intention to deliver the articles, but only to speculate upon the rise or fall of prices (153).

Agreements Contrary to Public Policy

Agreements contrary to public policy may be such as affect the position and duties of public officers (154, 155); or in case of corporations and others owing a duty to the public, contracts which tend to interfere with the proper performance of such duties to the whole public (156); or contracts which tend directly to interfere with the existence or operation of government (157), or the proper conduct of elections (155). Agreements which tend to interfere with public justice, by preventing the courts from exercising their proper control, are void; as in case of compounding a crime, suppressing evidence (158), exclusive arbitration agreements (159); and those which tend to encourage litigation, as in champerty and maintenance (160). Agreements of immoral tendency, as for present or future cohabitation, are void; but a note given only for past cohabitation is invalid for want of consideration, unless given under seal (161). Agreements which place persons under improper influence in the discharge of their duties to others, as in case of agent to principal (162), officer buying up county claims, or municipal councils contracting with one of their members (163). Agreements which tend to interfere with the freedom of choice or the relation of the parties in marriage are void; as in marriage brocage contracts, contracts in restraint of marriage, or agreements for divorce (164, 165); separation agreements based upon immediate separation and fixing the property rights of the parties will be sustained (166).

Contracts in Restraint of Trade

Contracts in restraint of trade are invalid, where the restraint is unreasonable in extent of time or space, or is not necessary to give the purchaser what he is entitled to under the contract; restrictions upon the alienation of property are not favored but are recognized in certain cases of spendthrift trusts and in the separate trusts for married women (167). Combinations, trusts and monopolies are against public policy, being prohibited in both State and Federal legislation, and agreements with such objects in view will not be enforced; but capital and labor may unite for mutual protection, so long as they do not use unfair means to affect the business of others (168). Common carriers and others owing a duty to the public may limit their common law liability by reasonable restrictions, but they can not by contract exempt themselves from liability for negligence. The liability of the master to the servant for injury, in the case of railroads, has been extended by the Employers' Liability Acts, and no contract will exempt from such liability (169).

Effect of Illegality

The effect of illegality is to render the contract void. If the contract is divisible so that the legal and illegal parts may be separated, the legal part may be enforced, but otherwise when it is indivisible (170, 171). If there is an illegal intention by one party, the other may enforce the contract provided he does not share in such intention; and where the connection between the illegal act and the agreement sought to be enforced is not direct, but remote, the latter will be upheld (172). If the plaintiff must base his claim upon an illegal transaction, the maxim *ex turpi causa* applies, but not where his claim is legal though indirectly connected with an illegal act or purpose (173). If the illegal act has not been performed, a party may recover what he has parted with, as when money is in the hands of a stakeholder; before the final consummation of the illegal act there is a place of repentance, and the party may change his mind (174). After the illegal act is complete, the law will not aid either party to recover what he has lost, if the parties are *in pari delicto*; nor will it lend its aid to enforce an illegal agreement. If the parties are not *in pari delicto*, as where the law violated was for the protection of one of the parties, or where one party has taken advantage of the other, the injured party may have relief. Even where the parties are *in pari delicto*, the law may lend its aid to prevent the carrying out of the illegal contract, or to prevent injustice; as where a mortgage is given to secure an illegal contract, its foreclosure may be enjoined, and an agent will not be allowed to retain the goods of the master gotten in an illegal transaction (175, 176, 177). While a void contract is a nullity and can not be the basis of any rights even in the hands of an innocent person, an illegal contract is not void in that sense, but rather voidable; if it is one absolutely prohibited by law, as in usury and gaming debts, it is void in the hands of anyone, but if it is illegal merely because it violates some law or public policy, it may be valid in the hands of an innocent purchaser (178). In the conflict of laws, *lex loci* controls the construction and validity; but where the contract violates the policy of the forum, or the remedy alone is affected, the *lex fori* controls (p. 455).

Effect of Contract

The *effect of contract* is determined by its operation upon the rights of third persons who are not parties to it, by ascertaining the terms of agreement and the obligations assumed by the parties to the contract. *Obligations can not be imposed upon third persons* without their consent, hence an agreement between A and B imposes no contract obligation upon C; or if A pays to B a debt which C owes, A has no right against C, unless payment was

at C's request, express or implied, or was ratified by C (179). There is an obligation, however, resting upon third persons *not to interfere* in the contract relations of others, but this has been held to apply only to contracts for personal service or to fraudulent interference (180, 181). Whether a right can be conferred upon a *third person to sue* upon a contract to which he is not a party, has been variously decided. At common law an action upon a bond was brought in the name of the payee, although made for the benefit of a third person named therein (182); but where one person places property in the hands of another upon a promise to pay a third person, such third person can sue upon such promise (51, 182). Most courts hold that where A makes a promise to B to pay C, C may sue A upon such promise, if there is an obligation existing between B and C. In North Carolina it is held that where the promise of A to B is in the nature of an indemnity, which may indirectly benefit C, that C can not sue A directly upon such promise, but may enforce it through the equitable right of subrogation; so where the mortgagor conveys the mortgaged premises and the purchaser assumes the mortgage debt. If the promise is made directly for the benefit of the third person, and he is a party to or directly interested in the consideration, he may sue the promisor directly as the real party in interest (183, 184, 185, 186, 187).

Assignment of Contract

By *assignment* a person may acquire rights under a contract, but a party to a contract can not assign his liabilities under it to a third person so as to bind the other party without his consent (188). A mere transfer of land under a mortgage does not transfer the personal liability for the debt (190). At common law a chose in action could not be assigned, but such transfer was recognized in equity, and the assignee could sue in the name of the assignor, or go into equity to protect his right; this rule did not apply in the case of negotiable instruments under the law merchant; and by statute now all assignable claims may be enforced in the name of the assignee as the real party in interest (189-195). The test of assignability is whether or not the claim would survive to or against the personal representative. A contract to pay money may be assigned by the payee, if there is nothing in the terms of the contract preventing it, or its transfer is not prohibited by law; but when rights arising out of contract are coupled with obligations to be performed involving personal skill or personal confidence, so that it must have been intended that the rights should be exercised and the obligations performed by the contractor alone, the contract, including both the right and obligation, can not be assigned without the consent of the other

party to the original contract (189). In the assignment generally no particular form is required; it may be done with or without writing, and in any form of words, provided the intent be clear to make the transfer, and the assignment is complete by notice to the debtor (196, 197). A negotiable instrument payable to bearer in transferred by delivery, and if payable to order, then by endorsement and delivery (198). An assignment transfers to the assignee only such rights as the assignor had at the time of the assignment or when notice was given; while in the proper transfer of a negotiable instrument, before maturity, for value, and without notice, the holder takes it free from all defenses (199-202).

Assignment by Operation of Law

Rights under a contract may be assigned by *operation of law*. In a lease of land, a condition or covenant as a material part of the contract, as for renewal, passes with the lease upon assignment; and in the conveyances of land generally those covenants which touch and concern the land pass with it, while strictly personal covenants do not (203, 204, 205). At common law the husband, by virtue of the marriage, became entitled to all the personal property of the wife, including the choses in action which he reduced to possession during coverture; if he survived the wife, he could hold such property as administrator, and after payment of her debts retain it to his own use; under the present law, the wife controls her own property, and only the rights as administrator remain to the husband (206). By the death of the parties all rights and liabilities under the contract survive to or against the personal representative, except those contracts which involve the performance of personal service by the promisor alone. The personal representative is the proper party to sue and be sued, except in case of a surviving partner (207).

Joint Obligations

At common law, *joint obligors* were all liable for the debt, and the action was brought against all, if living, and if any died, the survivors only were liable; in a *several* obligation, each obligor was separately liable; and in a *joint and several* obligation, the action was against one or all but not an intermediate number. Under the present statute joint obligations are considered joint or several, may be enforced against one or more, and there is no survivorship; a judgment against one is not a discharge as to the others, unless satisfied (208, 209). *Joint obligees* were all necessary parties to an action to enforce the obligation, and there was survivorship; they are now necessary parties; but there is no survivorship except in a partnership (210). A release or extension of time to one joint obligor may discharge the others, unless the

right against them is reserved. A surety paying more than his part of the debt has the right of contribution against his co-sureties, the right of exoneration against the principal, and the right of subrogation as to any securities held for the debt (211, 212).

Interpretation and Construction of Contracts

Interpretation and *construction* of a contract is ascertaining the terms and meaning of the contract and giving legal effect to it. What were the terms of contract is a question of fact for the jury; what is the meaning and legal effect of such terms is a question of law for the judge. In oral contracts the evidence is, of course, oral, but in written contracts such evidence is not always admissible (213). Parol evidence may be used to show the execution of the writing or the fact of agreement, if in dispute (214, 215, 216); if the writing is not the complete agreement, parol evidence may be used to show the oral part, provided it does not contradict the written part (217); when the writing is the complete agreement, parol evidence can not be used to vary or contradict it (218), but may be used to explain the meaning of terms (219), or to explain a latent ambiguity (220), or to show a custom or usage which may enter into the contract (221). The general rules of construction are, that the intention of the parties must control; this intention must be ascertained from the whole instrument; and in ascertaining it words will be given their ordinary meaning. The attending circumstances may sometimes be used as a key to the meaning, and in cases of doubt, the practical construction of the parties themselves may be used (222, 223). Time will generally be construed as of the essence of a contract at law, but not in equity unless the parties have made it material; and if no time is mentioned, a reasonable time will be inferred (55, 224). Where a definite sum is named in a contract as a forfeiture for failure to perform, it will be construed as a *penalty* to be discharged upon the payment of the actual damage; but if reasonable in amount and the actual damage can not be readily ascertained, it will be considered as *stipulated damages* (225).

Discharge of Contract by Agreement

In the *discharge of contract* obligations, this may result from the agreement of the parties, as in case of *rescission*, and when thus ended no further rights can be asserted under it, unless reserved (83, 226). There may be a *substitution* of an entirely new agreement by the parties, or of new terms or new parties in the old agreement (227). The form of discharge by agreement was formerly required to be of equal dignity with the original contract, but is no longer strictly observed, and a contract

under seal or in writing may be discharged by parol or by matter in pais (228, 229). The parties may have put into their agreement a *condition subsequent*, the performance or nonperformance of which will discharge the liability, as a "further insurance" clause in an insurance policy; or there may be certain implied terms in the contract, as inevitable accident, etc., which may discharge (230, 231, 232).

Discharge of Contract by Performance

Contracts may be *discharged* by the *performance* of the act required in the agreement. This may be a complete performance, or a *substantial performance*, but the latter will not discharge if the slight defect or omission was intentional (233). The contract may also require *performance to the satisfaction* of the other party or of a third person; the parties have thus fixed a standard which must usually be complied with (234, 235). *Payment* in money or specific articles, if required or accepted, will discharge the contract (236, 237); but taking a note for a prior obligation may be a discharge or only a suspension, according to the intention of the parties (238). If there are several debts, the debtor may direct the application of the payment to any of them at the time it is made; if he fails to direct the application, the creditor may apply it to any of the debts; and if neither makes the application, the law will apply it to the weakest debt (239). If the contract requires the delivery of specific articles, a *tender* of these at the time and place specified will discharge the obligation; but if for the payment of money, a *tender* of the amount due will stop interest and costs, provided the debtor shows that he has been always ready, and pays the money into court in case of suit (239, 240).

Breach of Contract, by Renunciation

A *breach of contract* may discharge one party from his obligation to perform and subject the other party to an action for damages or for other relief. The breach may be by *renunciation* before the time of performance arrives, anticipatory breach. If the contract is for the sale of articles not ready for delivery, the seller is entitled to damages at the time of breach, but he can not increase the damage by continuing the preparation of the articles (241). If the articles are ready for delivery the seller may keep them and sue for the damage, or treat them as the property of the purchaser and sue for the price, or resell them as the property of the purchaser and sue for the difference (241). Upon notice of renunciation, the party may act upon it at once and be discharged, but if he does not accept such renunciation, the contract is still open for both parties (242, 243). If the contract is for personal service, the one who is to perform the service may

wait until the end of the time and sue for damages or treat the contract as broken and sue for damages at once, as upon constructive service, according to some courts, while others do not recognize the constructive service doctrine (243, 245, 246). The renunciation or abandonment may be during the time of performance, and if the contract is entire the other party is discharged from any liability (244). If the servant is discharged without cause during his term he may sue for the services actually rendered; or sue at end of each period for payment; or wait until the expiration of the whole time and sue for the wages, subject to being diminished by what he might have earned; or he may sue at once for breach of contract and recover damages up to the time of bringing suit, according to one view, up to the time of trial by another view, and for the whole time under the constructive service view (243, 245, 246).

Failure of Performance

The breach of contract may be by *failure of performance*. If the contract is entire, the party failing to perform can not recover for the service rendered (247); but if the contract is divisible, he may recover for the services rendered upon a *quantum meruit* (248). Whether a contract is entire or divisible will depend upon the terms and the intention of the parties; and in case of performance by installments, a failure in any installment may be a discharge or only give a cause of action for damages (249). If the promises are independent, the breach of one does not discharge from performance of the other (250); if they are conditional, they may be *concurrent* conditions, in which case both parties must show a readiness to perform (251); or conditions *precedent* which must be performed before the other obligation arises (252). In contracts for the sale of goods, etc., the quality may be a *condition* which will be ground for rescission, or a *warranty* as a cause of action for damages. Whether or not there is a warranty depends upon the intention of the parties, and the distinction between a condition and a warranty is not always observed. For breach of condition or warranty, the purchaser may keep the property and sue for damages; or return the property, or notify the seller that he holds it subject to his order, and if he fail to take the property, the purchaser may sell it for the seller; or the purchaser may set up the breach as a defense in an action for the price. Where there is an express warranty, and it is provided that the article shall be returned if not as warranted, the buyer must comply by returning the article or lose the benefit of the warranty (253-257).

Failure of Consideration

A *failure of consideration* may operate as a discharge, if it is a total failure, while a partial failure only gives a cause of action for damages or counterclaim (258). In *alternative* contracts the promisor has the option up to the time for performance, and after that it is with the promisee (259). If performance is *impossible* at the time the contract is made or becomes impossible by the act of the other party, it will discharge; but subsequent impossibility does not generally excuse a breach, except where the law imposes the obligation, or the parties contemplate the continued existence or ability of the person, or the continued existence of the subject-matter (86, 246, 260-263).

Discharge by Operation of Law

A *discharge* may result by *operation of law*, as where a lower form of contract is *merged* into a higher (264); or where there has been an intentional *alteration* of an instrument in a material part by one of the parties or with his consent (265, 266, 267); or where the person under obligation has obtained his discharge in a proceeding in *bankruptcy* (p. 646).

Remedies for Breach

Upon a breach of contract, the party injured may bring an action at law for *damages*, and recover such damages as naturally result from the breach, or what the parties reasonably contemplated, and in case of special circumstances known to the parties, such damage as reasonably results from these circumstances; the damages in all cases must be actual and not remote or speculative (268, 269). In a proper case, as where the remedy at law for damages would be inadequate, relief may be had in equity by a decree for *specific performance* (270); or an injunction may be obtained to restrain the other party from violating his contract (167, p. 655). The *right of action* growing out of a breach of contract may also be lost or *discharged* by a *release* properly executed (271); by *accord and satisfaction* (272); by an *arbitration* and *award* (273); by a *judgment* rendered in a court of competent jurisdiction (274); or the action may be barred by the *statute of limitations*, unless it has been kept alive or revived by a payment, a new promise in writing, or the party is estopped by a promise not to plead the statute (275).

Cases on the Law of Contracts.

I. Formation of Contract.

CHAPTER I.

AGREEMENT.

Sec. 1. Definition of contract.

(1) JUSTICE v. LANG,

42 N. Y., 493, 1 A. R., 576—1870.

The plaintiff brought this action for the recovery of damages from the defendants for the nonperformance of their promise, contained in the following memorandum or instrument in writing, signed by them, viz.:

We agree to deliver P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York, at \$18 each, cash upon delivery. Said rifles to be shipped from Liverpool not later than 1, July, and before, if possible.

W. Bailey Lang & Co.

After proof of the negotiation of the parties, the execution of the instrument by the defendants, its acceptance by the plaintiff, and other evidence to sustain his action, but without showing that a counterpart of the memorandum, or any instrument in writing whatever, was signed by him to accept the rifles or pay for them, he rested his case. Upon motion of defendant's counsel, the judge dismissed the complaint on the ground that it was a *nudum pactum*. "It expresses no consideration, and there is no evidence tending to show that the proposed purchaser ever agreed to take the rifles and pay for them." Plaintiff appealed.

LOTT, J. The ground assigned by the learned judge for the dismissal of the action renders it necessary to examine into the validity of the contract at common law. Blackstone in his commentaries, defines a contract to be "an agreement upon sufficient consideration to do, or not to do, a particular thing;" and he says the price, or motive of the contract, we call the consideration. Kent's definition of an executory contract is, an agreement of two or more persons, upon sufficient consideration, to do or not to do a

particular thing. 2 Kent Com., 449. Comyn in his work on contracts says: A simple contract, or contract by parol, is defined in our law books to be a "bargain or agreement voluntarily made upon good consideration, between two or more persons capable of contracting, to do, or forbear to do, some lawful act." And "six things appear necessary to concur: 1. A person able to contract. 2. A person able to be contracted with. 3. A thing to be contracted for. 4. A good and sufficient consideration, or *quid pro quo*. 5. Clear and explicit words to express the contract or agreement. 6. The assent of both the contracting parties." He adds: "So, every contract should be obligatory on both the contracting parties, or both should be at liberty to recede therefrom; but to an agreement or contract there is no prescribed form of words, but any words which show the assent of the parties is sufficient." He also in this connection states that a voluntary promise, without any other consideration than mere good will, or natural affection, to give to another a sum of money, as for instance twenty pounds, and that he will be a debtor for such sum, is no contract, but a mere *nudum pactum*, and that the law will not compel the execution by a person of what he had no visible inducement to engage for, but any degree of reciprocity will prevent the agreement or promise from being classed under this rule; and he illustrates the distinction by saying that in the case put, if anything however trifling were done or to be done or given for the twenty pounds, it would be a valid contract and binding upon the parties. Chitty says: "A contract or agreement, not under seal, may be thus defined or described: A mutual assent of two or more parties competent to contract, founded on a sufficient and legal motive, inducement or consideration, to perform some legal act, or to omit to do anything, the performance of which is not enjoined by law." Cont., 3.

All of these definitions are substantially the same; and upon the application of that given by Comyn, which embraces the others, and appears to me to be a precise and explicit exposition of the necessary ingredients of a contract, to the memorandum in question, with his illustrations, it will be seen that it constitutes a sufficient and perfect agreement. It shows that the plaintiff and the defendants were the contracting parties, the first as seller, and the last as purchaser; that the thing contracted for was Enfield rifles; that a good and sufficient consideration, or *quid pro quo*, was expressed, being the delivery of such rifles to the defendants at New York on the payment by them to the plaintiff of eighteen dollars each, cash upon delivery. Clear and explicit words were used to express the terms of the contract and agreement, leaving no doubt as to the subject-matter thereof, the time and place for the de-

livery of the goods to be delivered, the price or sum to be paid, and when such payment was to be made; and the assent of both the contracting parties also appears, that of the sellers by subscribing their firm name at the end of the contract, and that of the buyer by the acceptance thereof. Although there is no distinct and express promise in terms by the plaintiff to pay the price specified, the terms, "cash on delivery," imply a promise, and create an obligation to make such payment when the rifles are delivered. I shall assume, therefore, that the contract was valid and binding on the defendants at common law. (The court then discussed the contract with reference to the statute of frauds.) The judgment below is reversed and a new trial ordered.

Sec. 2. Two or more parties.

(2) BURDITT, ADMR., v. COLBURN, ADMR.,

63 Vt., 231, 22 Atl., 572, 13 L. R. A., 676—1891.

Meacham was administrator of Gorham, and became largely indebted to the estate for money which had come into his hands and which he had converted to his own use. For the purpose of securing the estate, he executed a promissory note for \$1,500, payable to himself as administrator on demand, and executed a mortgage on his property to secure this. He died without settling the estate, being indebted to the estate about \$7,000, and to others about \$9,000, and having assets about \$4,000. After Meacham's death Colburn administered on his estate, and Burditt was appointed administrator of Gorham's estate. Colburn found the note and mortgage among Meacham's papers and gave them to Burditt, who had the mortgage registered and filed a bill for foreclosure. The bill was dismissed, and Burditt appealed.

Affirmed.

TYLER, J. The mortgage must be held invalid for want of contracting parties. A contract necessarily implies a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. One person can not by his promise confer a right against himself until the person to whom the promise was made has accepted the same. Until the concurrence of the two minds, there is no contract; there is merely an offer which the promisor may at any time retract. Chitty Cont., 9, Pothier. It is essential to the validity of a deed that there be proper parties,—a person able to contract, and a person able to be contracted with. 3 Wash. Real Prop., 217.

To uphold this mortgage, we must say that there may be two distinct persons in one; for in law the mortgagor and mortgagee

are identical. The addition of the words "admr. of Gorham's estate" does not change the legal effect of the grant, which is to Meacham in his individual capacity. In 3 Wash. Real Prop., 279, it is said that a grant to A, B and C, trustees of a society named, their heirs, etc., is a grant to them individually; and *Austin v. Shaw*, 10 Allen, 552; *Towar v. Hale*, 46 Barb., 361; *Brown v. Combs*, 29 N. J. L., 36, are cited. In this case the grant and the *habendum* are not to the estate and its legal representatives, but to Meacham, executor, his heirs and assigns. Meacham had misappropriated the funds of the estate, and no one but himself assented to his giving a note and mortgage for the purpose of partially covering his default. (The court then discussed the question of delivery, and held that there had been no valid delivery.)

Decree affirmed.

(3) BANK v. GRIFFIN,

107 N. C., 173, 11 S. E., 1049, 22 A. S. R., 868—1890.

This was a civil action in which a jury trial was waived and the Judge found the following facts: "W. J. Griffin and W. O. Temple were partners under the firm name of Griffin & Temple. On March 23, 1889, they, as individuals, and the other defendants, W. S. Temple and J. R. Etheridge, executed a promissory note as follows: 'Sixty days after date we, jointly and severally, promise to pay to Griffin & Temple, negotiable and payable without offset, at the Norfolk National Bank, four hundred dollars, for value received, etc.' Etheridge and W. S. Temple received no benefit, but signed the note for the accommodation of Griffin & Temple, to enable them to get the money. The note was endorsed to plaintiff by Griffin & Temple for value and with notice of the facts. The note has not been paid."

Upon these facts the court rendered judgment for the plaintiff, and the defendants, Etheridge and W. S. Temple, appealed.

CLARK, J. A bond made payable to the obligor is void. *Pearson v. Nesbit*, 12 N. C., 315; *Justices v. Shannonhouse*, 13 N. C., 6; *Justices v. Armstrong*, 14 N. C., 285. A bond is a deed, and no man can execute and deliver a deed to himself.

"According to common law principles, a promissory note made payable by a person to himself creates of itself no liability to pay it. This is so, not for the reason that it is contrary to public policy, immoral or illegal, but because a person can not contract with himself." *Jenkins v. Bass* (Ky.), 11 S. W. Rep., 293. Indeed there is no contract till such paper has been endorsed over to another, when there springs up by the law merchant a valid contract between the maker and the endorsee. I Daniel Neg. In-

struments, sec. 130; *Wood v. Maytton*, 10 Adol. & E., 809 (59 E. C. L.); *Smith v. Lusher*, 5 Cowen, 688; *Plets v. Johnson*, 3 Hill (N. Y.), 112.

In this case, the note, upon its face, was executed for the purpose of being negotiated. It is found, as a fact, that the defendants signed it as an accommodation paper to enable those of the makers who are named as payees therein to raise money on the paper. Doubtless they were so named as payees because it was not yet known who would lend money on the note, and it was desired not to leave the names of payees in blank. Such practice is not unusual, and is well recognized by the law merchant.

The note was negotiated, as defendants intended should be done, and value received thereon. To protect them, upon the technical grounds set up, against the consequences of their own act, would be against good morals, and would enable them to perpetrate a fraud on the plaintiff. By the endorsement to plaintiff, the contract, till then imperfect, became perfect and completed.

No error.

Smalley v. Wright, 44 Me., 442, 69 A. D., 112; *Thayer v. Buffum*, 11 Metc., 398; *Allen v. Shadbourn*, 1 Dana (Ky.), 68, 25 A. D., 121.

One of the justices of a county could not enter into a contract with his associate justices in their official capacity. *Justices v. Simmons*, 48—187; 13—6, and 14—284; *Justices v. Bonner*, 14—289; *Justices v. Dozier*, 14—287; *Dickey v. Allen*, 15—43; *Davis v. Somerville*, 15—382; *Vanhook v. Barnett*, 15—268.

A person can not be plaintiff and defendant in the same action, because he can not enforce an obligation against himself. *Pearson v. Nesbit*, 12—315 (confessed judgment set aside); *Newsom v. Newsom*, 26—381; *Sanders v. Bean*, 44—318 (surety on official bond could not as relator sue his cosureties on the bond); *Smith v. Bryson*, 62—267; *Medlin v. Simpson*, 144—397; *Terry v. Brightman*, 132 Mass., 318. One partner can not sue the other on an obligation to the firm, but he may sue on an individual contract as to the terms of partnership. *Ledford v. Emerson*, 140—288; *Owen v. Murray*, 136—475; *Newby v. Harrell*, 99—149; *Rogers v. Rogers*, 40—31. A trustee or agent can not contract with himself. *Boyd v. Hawkins*, 37—304; *Pegram v. R. R.*, 84—702; *Taussig v. Hart*, 58 N. Y., 425.

"It takes two to make a bargain" is a maxim of law, the soundness of which strikes the good sense of everyone, so that it has become a "common saying." *Pearson, J.*, in *Spruill v. Trader*, 50—39. But the donee of a power may execute a deed in that capacity to himself. *Jones v. Pullen*, 115—475; *Gorrell v. Alspaugh*, 120—365; *Mordecai's Lectures*, p. 716; *Whitehead v. Hellen*, 76—99; *Owens v. Browning Mfg. Co. (N. C.)*, 84 S. E. 389.

On the subject generally, see 7 Am. & Eng. Encyc., 99; 9 Cyc., 371; *Bishop on Contracts*, secs. 250-254; *Clark on Contracts*, pp. 3, 5; 6 R. C. L., 592.

Sec. 3. Common intention.

(4) MACHINE COMPANY v. CHALKLEY,

143 N. C., 181, 55 S. E., 524—1906.

This action was brought by Charles Holmes Machine Company against D. B. and M. H. Chalkley, trading as Stanton Tanning Company, to recover, among other things, a Sawyer measuring machine, or its value, \$250, and \$100 for its detention, etc.

The plaintiff advertised for sale a Sawyer measuring machine, and the defendant, referring to the advertisement, inquired by letter for the price of the machine, describing it as a Sawyer whole-hide measuring machine. In the correspondence which followed the plaintiff agreed to sell a Sawyer measuring machine, as it is described in the advertisement, at \$250, and the defendant to buy a whole-hide measuring machine at that price. The defendant received the machine and sold it for \$250, and sets up a counterclaim for \$600, the difference between this machine and a whole-hide measuring machine, which he alleges he bought.

There was a verdict and judgment for plaintiff, and defendant appealed.

WALKER, J. The first and most essential element of an agreement is the consent of the parties, an *aggregatio mentium*, or meeting of two minds in one and the same intention, and until the moment arrives when the minds of the parties are thus drawn together, the contract is not complete, so as to be legally enforceable. Wald's Pollock on Cont. (3 Ed.), p. 3. It is necessary that the parties should be assured by mutual communication or negotiation that a common intention exists and that they mean the same thing in the same sense. *Ibid.* (1 Ed., 1881), p. 5. It must be remembered, though, that this common intention is a fact, or inference of fact, which, like any other fact, has to be proved according to the general rules of evidence. *Ibid.* (3 Ed.), p. 4. Nor is the contract to be ascertained by what either one of the parties thought it was, but by what both agreed it should be. *Prince v. McRae*, 84 N. C., 674. The law proceeds not upon the understanding of one of the parties, but upon the agreement of both. *Lumber Co. v. Lumber Co.*, 137 N. C., 436, where the authorities are collected. Subject to this rule, if the treaty of the parties is based upon a material mistake of fact of such character that there is no mutual assent to one and the same thing, then no contract comes into existence, as, in contemplation of law, there has been a failure to agree. *Tiffany on Sales*, p. 108.

In this case the difference between the parties is as to the sub-

ject-matter of their contract or as to what was sold by one and bought by the other. "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*. Utley v. Donaldson, 94 U. S., 29. It has also been said that "as mutual assent is necessary to the formation of the contract, it follows that an error or mistake of fact in that which goes to the essence of the agreement, and therefore excludes such assent, prevents the formation of the contract, since each party is really assenting to something different, notwithstanding the apparent mutual assent." 24 Am. & Eng. Enc. (2 Ed.), p. 1034. And this doctrine, of course, applies to a mistake of the parties as to the subject-matter, as is there stated. In a case much like this one it was held that the contract must be one on the one side to sell, and on the other side to accept one and the same thing. Thornton v. Kempster, 5 Taunton, 786 (1 E. C. L., 265). Where there is a mistake as to the subject-matter of the sale, it affects the substance of the contract by eliminating its essential element, the mutual assent of the parties, upon the principle embodied in the maxim of the civil law, "*Cum in corpore dissentitur, apparet nullam esse acceptionem*." Gardner v. Lane, 94 Mass., 39. So in the case of Kyle v. Kavanagh, 103 Mass., 356, the court uses language peculiarly applicable to the facts of this case: "If the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject-matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This rule is in accordance with the elementary principles of the law of contract." The following cases are also in point: Wheat v. Cross, 31 Md., 99; Sherwood v. Walker, 66 Mich., 568; Cutts v. Guild, 57 N. Y., 229; Calkins v. Griswold, 11 Hun (N. Y.), 208; Sheldon v. Capron, 3 R. I., 171; Ketchum v. Catlin, 21 Vt., 191; Spurr v. Benedict, 99 Mass., 463.

Let us now apply the principles thus established to the facts of this case. The correspondence plainly shows, as His Honor held, that the parties were mutually mistaken as to what was being sold. The plaintiff advertised for sale the very machine which was shipped to the defendant, it being the one and the only one it proposed to sell at \$250. The defendant accepted the proposal, but not according to the terms in which it was made. The plaintiff proposed to sell one thing and the defendant to buy another and quite different thing. There is no other construction to be placed upon the correspondence between the parties. There was a mutual mistake as to an essential matter, and the minds of the parties have therefore not met in one and the same intention. There is

no fraud alleged in this case, but nevertheless it results that there was no contract. The defendant, though, has received and converted to his own use the machine shipped to him, and as it was not his property, but belonged to the plaintiff, he is liable for its value, which is admitted to be \$250, that being the amount realized from the sale of it by him. *Tiffany on Sales*, pp. 108, 109. In this view of the case the counterclaim, as a matter of course, must fail.

It does not appear that there is any machine known in the trade as a "whole-hide measuring machine," though there may be one of that kind. Assuming that there is, the defendant says in his counterclaim that it is worth \$900, and seeks to recover the difference in the price of the two machines. The defendant was conducting a tannery at Stanton, N. C., and intended to use the machine in his business and may be presumed to have had knowledge of the value of such machines. It seems that he expected to buy a machine worth \$900 at the much reduced price of \$250. The great disparity between the real value of the machine which the defendant thought he was buying and the price at which the plaintiff's machine was advertised for sale, it would seem, was sufficient to excite his inquiry as to whether he and the plaintiff really understood each other, if not to induce the belief that there was a mistake. But however this may be, they did not agree, and there was no sale by which the defendant acquired title to something he did not get, but which, as he alleges, he should have received.

No error.

(5) BRUNHILD v. FREEMAN,

77 N. C., 128—1877.

This was a civil action in which there was a verdict and judgment for the plaintiff, and an appeal by the defendant.

READE, J. The plaintiff sold goods to one Mayer to the amount of \$415, and took from Mayer as collateral security therefor eight notes for \$125 each, which Mayer held upon the defendant. The defendant subsequently gave to the plaintiff on account of the transaction four notes for \$100 each, and this action is upon one of these four new notes. And the plaintiff had a verdict and judgment. This is all plain enough, but the defendant says that at the time when he gave the plaintiff the four new notes it was upon the understanding that the eight old notes were to be delivered up to him by the plaintiff, and that the plaintiff refused to deliver them up. And the plaintiff having refused to comply with his part of the contract to deliver up the old notes, he, the defendant, was not obliged to comply with his part of the contract to pay the new notes.

By what sort of financial legerdemain the defendant supposed that he could fairly get clear of the \$1,000, which he owed Mayer, by giving his notes to the plaintiff for \$400, he seems not to have made plain to the court below, nor is it plain to us. He did get credit upon the old notes for the amount of the new. And that was all he was fairly entitled to. Indeed, he got credit for \$15 more than the new notes. The justice of the case is, therefore, administered by the verdict and judgment below, and they must be sustained unless some general principle has been violated.

The testimony for the plaintiff was that he held the eight notes for \$125 each, upon the defendant only as collateral to secure him \$415 which Mayer owed him, and that he agreed with the defendant to take his four new notes for \$100 each and enter a credit of \$415 on the old notes, informing the defendant that he would then have to deliver the old notes to Mayer, and that this was done. The testimony on the part of the defendant was, that it was agreed between him and the plaintiff that upon his giving the four new notes, the plaintiff was to give him up the whole of the old notes.

The defendant asked His Honor to charge that if the new notes were given upon the agreement that all of the old notes were to be surrendered, and they had not been surrendered, then the plaintiff was not entitled to recover. His Honor gave the charge and therefore the defendant can not complain, although it may be that the plaintiff could recover, leaving the defendant to his cross-action for damages, or to his counterclaim.

The defendant also asked His Honor to charge that if there was a misunderstanding, one party understanding that there was only to be a credit for the \$415 upon the old bonds, and the other, that they were all to be surrendered, then the plaintiff could not recover.

His Honor could not give this instruction, because it is admitted on both sides that there was a contract of some sort, and where there is a contract, if the parties can not agree upon the meaning of it, as is frequently the case, and as in this case, then it is for the jury or for the court to say what is the meaning.

The defendant chiefly relied upon His Honor's refusal to give the following charge: "That the question was not what the plaintiff thought, but what the defendant thought, and if the defendant did not intend to assume the payment of the \$400, save upon the delivery to him of the eight notes, the plaintiff could not recover."

His Honor very properly refused to so charge, but did charge that it was not what either thought, but what both agreed.

His Honor further charged that if there was no agreement, then the plaintiff was entitled to a verdict. And to this defendant objects that His Honor charged that the plaintiff could recover with-

out any contract whatever. But that was not the meaning. The note sued on was the contract upon which the plaintiff was to recover, and the defendant sought to defeat the action by proving another contract, the terms of which were in doubt. And His Honor after having explained what would be the bearing of the contract under one hypothesis and another, charged that if there was no agreement at all outside of, or inconsistent with, the note sued on, then the plaintiff was entitled to recover.

There is no error.

Judgment affirmed.

The contract is not what either party thought, but what both agreed. *Pendleton v. Jones*, 82—249. See also *Gregory v. Bullock*, 120—260; *Prince v. McRae*, 84—674; *Pegram v. R. R.*, 84—696; *Bailey v. Rutjes*, 86—520; *Hedgepeth v. Rose*, 95—41; *King v. Phillips*, 94—558; *Thomas v. Shooting Club*, 121—238; 1 *Pars. Cont.* (9 Ed.) 475.

See also *Lumber Co. v. Lumber Co.*, 137—432, 436; *Barber-Paschall Lumber Co. v. Boushall*, — N. C. —, 84 S. E., 800; *Insurance Co. v. Young*, 23 Wall., 85; *H. & N. H. R. v. Jackson*, 24 Conn., 514, 63 A. D., 177; *Russell v. Clough*, 71 N. H., 177, 51 Atl., 632, 93 A. S. R., 507; *Woods v. Ayres*, 39 Mich., 345, 33 A. R., 396; 6 R. C. L., 599; *Contracts, Cent. Dig.*, secs. 61, 72; *Dec. Dig.*, sec. 15.

Executed and executory contracts.—An executed contract is one in which both parties have done all that they are required to do. This conveys a chose in possession. An executory contract is one in which something remains to be done by one or both parties. This conveys a chose in action. 2 *Blk.*, 443; *Mordecai's Lectures*, 971; *Barneycastle v. Walker*, 92—200; 1 *Page Cont.*, s. 18. If both have not done what they were to do, it is sometimes called a bilateral contract; if only one has something yet to do, it is called a unilateral contract. 1 *Page Cont.*, s. 17. These terms are sometimes used of options, *Alston v. Connell*, 140—485; 125—329; or in contracts under the Statute of Frauds, *Lumber Co. v. Corey*, 140—462. See 6 R. C. L., 590; *Contracts, Cent. Dig.*, sec. 8; *Dec. Dig.*, sec. 6.

An executed contract of sale is one in which the title to property passes, though there may not be actual delivery. *Allman v. Davis*, 24—12; *Willard v. Perkins*, 44—253; *Long v. Spruill*, 52—96; *Cohen v. Stewart*, 98—97. An executory contract of sale is one in which there is an agreement, but there is something more to be done before the title passes. *Waldo v. Belcher*, 33—609; *Devane v. Fewall*, 24—36; *Wittkowsky v. Wasson*, 71—451; *Atkinson v. Graves*, 91—99; *Drill Co. v. Allison*, 94—548; *Phifer v. Erwin*, 100—74, and cases cited; *Blakely v. Patrick*, 67—40; *Richardson v. Ins. Co.*, 136—314; *Branson v. Gales*, 7—312; *State v. Wernwag*, 116—1062; *Lumber Co. v. Wilcox*, 105—34; *Heiser v. Meares*, 120—443; *Coles v. Lumber Co.*, 150—183; *Mordecai's Lectures*, 973.

Express and implied contracts.—An express contract is where the parties have definitely fixed the terms of their agreement. An implied contract (in fact) is one in which the terms are gathered from the circumstances and not from a definite agreement; an implied contract (in law), or quasi contract, is one in which the law imposes the obligation without regard to actual agreement. 6 R. C. L., 586.

A void contract is one destitute of legal effect, a mere nullity, not binding upon either party, and may be attacked by strangers. It may be simply disregarded, and can not be made valid by ratification. *McNeill v. R. R.*, 135, p. 683. A voidable contract is one that may be avoided at the option of one of the parties, as in case of contracts by infants. An unenforceable contract is one that can not be enforced by reason of its wanting the legal requirements as to form, etc. *Clark Cont.*, 10; 1 *Page Cont.*, s. 20; 6 R. C. L. 591.

CHAPTER II.

MANNER OF AGREEMENT.

Sec. 1. Express contract.

(6) CRAWFORD v. GEISER MANUFACTURING CO.,
88 N. C., 554—1883.

This was a civil action brought for breach of contract contained in the following writing:

“WAYNESBORO, PA.

“Geiser Manufacturing Co.

“You will please furnish, marked to me at Salisbury, N. C., six No. 2 separators (threshing machines), four of said machines to have horsepowers and to be changed to suit the trade, either to be on two or four wheels, as seems best, and to be shipped on or before May 1, 1881, at a discount of 30 percent from the list price of The Geiser Manufacturing Co., to be paid by draft at date of shipment, and any engines wanted, at a discount of 25 percent from list, payable when shipped.” (Signed by plaintiff and defendant.) The plaintiff offered to comply with the contract by paying cash for the machines, and asked that they be shipped, and the defendant refused to furnish them. The defendants admitted the execution of the writing, but denied that it was binding upon them as a contract, and alleged that it was only a request which they could refuse. They also said that they intended to comply with this request until they made a contract with another firm for the sale of the machines, and that they could not comply with this request without violating that contract; and that they offered to furnish the machines, if the plaintiff would sign a bond to sell them at a certain price. Several letters were offered in evidence, which are sufficiently referred to in the opinion.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

ASHE, J. The only point presented by the record, as raised in the court below, is the exception of the defendant to His Honor's refusal to give the instructions asked, to wit, that the paper-writing dated August 28, 1880, as the evidence of the contract, is so defective and uncertain that it can not be enforced, and as the plain-

tiff's demand is based thereon, the plaintiff can not recover in this action. The instruction was properly refused.

The contract is sufficiently explicit to maintain the action. Any one who reads the paper-writing would at once understand its import: that it is an agreement on the part of the defendant to furnish the articles therein described, on or before May 1, 1881, for which the plaintiff was to pay the defendant, at date of shipment, by his draft of that date, the amount of defendant's published prices for said articles, less discount of 30 percent. There is no uncertainty or ambiguity about it. The defendant understood it. There is no allegation or even pretense in the answer that there was any such indefiniteness in the terms of the writing, as that insisted upon in the prayer for instructions and the argument of his counsel before this court.

One of the defenses set up by the answer was, that the paper-writing was a mere request, on the part of the plaintiff to the defendant to furnish the machines, and was not a contract. If not a contract, why sign it? "A contract is an agreement upon sufficient consideration to do or not to do a particular thing." 2 Blk., 440. The plaintiff proposed to the defendant, in writing, to pay it a certain sum if it would ship to plaintiff a certain number of machines, on or before the first of May, 1881. The defendant signed the writing, which is equivalent to saying, "I accept your proposition and will ship the articles according to your proposal." The defendant signed the writing which, in the answer, is called a "letter," when it well knew it was not a letter, but was a contract, written by its secretary at its place of business in the State of Pennsylvania. It had recognized the writing as a contract prior to the action. As late as April 28, 1881, in a letter of that date, the defendant wrote: "We knew nothing of the transaction you speak of, until long after we sold you the machines, or rather contracted with you for them."

The only other defense was the lame and flimsy excuse that it had made a contract with a firm in Richmond, Va., to sell its machines, and that a compliance with the contract with the plaintiff would interfere with that arrangement, and, therefore, it could not comply.

The controlling motive in failing to perform its part of the contract was evidently the apprehension that if the machines were delivered, the plaintiff might undersell its Virginia agent; hence this unwillingness still to deliver the machines, unless the plaintiff would give the defendant a bond not to sell them for less than the factory prices, thus attempting to impose new conditions upon the plaintiff, which he thought unreasonable, and set up his refusal

to accept them, as matter of defense to its liability to damages for the breach of its contract.

While we hold there is no error in the judgment of the Superior Court in regard to the liability of the defendant upon the contract sued on, we are of the opinion there was error in the judge's charge as to the measure of damages.

The expenses of the plaintiff in sending an agent to the defendant, at Waynesboro, was not such an expense as necessarily resulted from the contract.

The true measure of damages in this case is the difference in the contract price of the machines and their market value at Salisbury on the 1st of May, 1881, less the cost of transportation.

The verdict is not to be disturbed except as to the damages, and to that end the case is remanded that an inquiry may be had as to the damages, in conformity to this opinion. The judgment will, therefore, be reformed so as to open that issue only, and in other respects it is affirmed. *Burton v. R. R.*, 84—192; *Lindley v. R. R.*, 88—547.

Judgment accordingly.

Defendant telegraphed to plaintiff: "Can offer you extra force at \$65 per month. Will want you to ditch D. & N. road and R. & G. Answer quick. Job will last all the year." Plaintiff accepted and went to work and was stopped at the end of eleven days. This was held to be a valid offer and acceptance for the year. *King v. R. R.*, 140—433. Defendant wrote to plaintiff: "I beg to advise that you have been appointed general storekeeper for the system, to take effect July 15. Your salary will be \$1,800 a year. You will be in charge," etc. Plaintiff accepted and was paid \$150 a month until January 1, and was then discharged. In a suit for salary to July 15, it was held to be a contract by the month. *Edwards v. R. R.*, 121—490. A leased a store for one year and as much longer as he continued in business. He continued in possession after the end of the year. It was held that this did not make him a tenant from year to year, but by special terms only until he quit business. *Harty v. Harris*, 120—408. See also *Outland v. R. R.*, 134—350; *Currier v. Lumber Co.*, 150—694; *Jennette v. Hay & Groc. Co.*, 158—156. For explanation of express and implied contracts, see *Woods v. Ayres*, 39 Mich., 345, 33 A. R., 396; *Col. H. V. & T. R. R. v. Gaffney*, 65 Ohio St., 104, 61 N. E., 152; 6 R. C. L., 586.

Sec. 2. Implied contract (in fact).

1. Arises when.

(7) *PRINCE v. McRAE*,

84 N. C., 674—1881.

This was a civil action commenced before a Justice of the Peace and tried on appeal in Superior Court. From a verdict and judgment for plaintiff the defendant appealed.

SMITH, C. J. The action is to recover for professional services rendered by the plaintiff, a physician, to the defendant's intestate, which is resisted on the ground that they were intended to be and were gratuitous.

The plaintiff admitted that he had made no entry of a charge upon his books; and the defendant testified that at the administration sale the plaintiff bought a horse and proposed to pay for him from his account, remarking that he had not intended to charge the intestate, but that seeing others present their accounts, he concluded to present his own.

The defendant's counsel requested His Honor to instruct the jury that if the plaintiff at the time the services were rendered did not intend to make a charge for them, he could not recover. This was refused, and the jury were directed that if from the testimony they should find that the intestate employed the plaintiff, and the services were rendered without any express agreement to pay a definite sum, the law would imply a promise to pay what they were reasonably worth.

The exceptions to the instruction refused and to the instruction given are for review on the appeal.

The proposed instruction proceeds from a misconception of the nature and essential requisites of a contract and was rightfully refused. A contract, express or implied, executed or executory, results from the concurrence of the minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree. *Brunhild v. Freeman*, 77—128; *Pendleton v. Jones*, 82—249.

Whether the plaintiff's services shall be deemed a gratuity or constitute a claim for compensation, must be determined by the common understanding of both parties. If they were intended to be and were accepted as a gift or act of benevolence, they can not at the election of the plaintiff create a legal obligation to pay. But their character is not controlled by the inexpressed and revocable intentions of the plaintiff, although his purposes subsequently asserted may aid in ascertaining it. The matter was properly left to the jury and their verdict finds that the intestate did employ the plaintiff and the services were rendered, and they have also fixed their value.

There is no error in the charge, but there is error in the judgment so far as it allows interest from May 19, 1880. The entire damages are assessed in the verdict at Fall Term, 1880, at \$200, and interest is only allowable thereafter. Thus corrected the judgment must be affirmed, and it is so ordered.

No error.

Modified and affirmed.

Plaintiff prepared certain leases for the defendant, not expecting to charge for this work, but expecting to get further employment growing out of these leases. The parties failed to agree as to such other employment, and plaintiff sued for the value of the first service. It was held that if he did not intend to charge, and this was known to defendant, he could not afterwards change his mind and recover for the service, but the implied promise arose in the absence of such agreement. *Thomas v. Shooting Club*, 121—238.

If A performs services for B, for which a man might reasonably expect to receive payment, and B knows of such service and accepts it, or not knowing of its performance, accepts it afterward when he had an opportunity to accept or reject, there is an implied obligation to pay what the service is reasonably worth, inferred as a fact from the circumstances. *Potter v. Carpenter*, 76 N. Y., 157; *Johnson v. Kimball*, 172 Mass., 398, 52 N. E., 386; *The Brabo*, 33 Fed., 884; *Day v. Caton*, 119 Mass., 513, Rem., 650; *Luner v. Traders Co.*, 44 W. Va., 175, 28 S. E., 730; *Bartholomew v. Jackson*, 20 Johns., 28, 11 A. D., 237, Rem., 648; *Pollock Cont.* (3d Ed.), 11; 6 R. C. L., 587; *University v. McNair*, 37—605; *Hedrick v. Wagoner*, 53—360; *Hedgepeth v. Rose*, 95—41.

(8) BAILEY v. RUTJES and others,

86 N. C., 517—1882.

This was a civil action to enforce a mechanic's lien for lumber furnished and used in certain buildings.

The defendants, Walton and Pearson, were the owners of "Glen Alpine Springs," and leased the same to the defendant, Rutjes, for five years. Rutjes was to make improvements on the premises at his own expense and deduct the value from the rent. The plaintiff furnished lumber to Rutjes, which was used in making the improvements, and the other defendants knew that the lumber was so furnished and used. Rutjes afterwards surrendered the lease to Walton and Pearson before the time expired, and failed to pay for the lumber. The plaintiff sued Walton and Pearson, who denied that they were liable for the lumber or had anything to do with the contract. There was a verdict and judgment for plaintiff, and the defendants appealed.

RUFFIN, J. The action is one for goods sold and delivered, and as said by His Honor, in order to maintain it, the plaintiff must show a contract, express or implied, on the part of the defendants to pay him for the lumber furnished. As the case discloses no facts going to show the existence of any express contract, at least prior to the date of delivery, we are driven to conclude that the verdict was, or may have been, controlled by that part of the instructions which had reference to the implied contract.

The defendants complain of this, and we think justly so, because it made the case to turn, not upon the agreement of the parties, but upon the reasonable belief of one of them. To constitute any contract, there must be a proposal by one party and acceptance by

the other, resulting in an obligation upon one or both; or in other words, there must be a *promise*. Pollock on Contracts, 5.

The fact then that the plaintiff expected (however reasonably) the defendants to pay him for the timber, could certainly not be sufficient of itself to establish the existence of a contract on their part to do so. *Brunhild v. Freeman*, 77—128; *Taft v. Dickinson*, 6 Allen, 553; *Pendleton v. Jones*, 82—249.

It must be shown further that, in some way, they assented to be charged either in terms or by conduct, from which the law will infer their assent.

It is unquestionably true that if in the absence of all express understanding one stands by in silence (and much more if he actively encourages) and sees work done, or material furnished for work upon premises belonging to him, and of which he must necessarily get the benefit, and afterwards he does accept and enjoy it, a promise to pay the value thereof may be inferred, and ordinarily will be; and the inference under the circumstances will be purely one of fact, viz., whether the party's conduct has been such that a reasonable man might understand from it, that he meant to recognize the benefit as one conferred on himself, and to pay for it. In such a case there can be no difficulty in making such an inference against the party, since the premises being his, the benefit of the labor done or the material furnished must necessarily result to him, and withal, he had the opportunity and the power to countermand it, if he would.

But in the case at bar, the defendants, if their testimony is to be believed, had leased the premises to Rutjes for five years, and he had undertaken to have the improvements made, which called for the use of the lumber furnished by the plaintiff. They were therefore absolutely without the power, either to give or withhold their sanction to its delivery and use, and ought not to be required to pay for it, unless they knew, or had reason to believe that the plaintiff was looking to them for pay for his lumber, and allowed him to deliver it under that expectation and without objection on their part. *Day v. Cayton*, 119 Mass., 513; *Wells v. Banister*, 4 Mass., 514. And it was in its failure to call the attention of the jury to this view of the case that the error of the charge, as we conceive, consists. The instruction given should have been that if the defendants knowing that the plaintiff expected them to pay for the lumber acted in such wise as to create a reasonable belief on his part that they would do so, and thereby induced him to deliver it, then the jury might infer a promise on their part to pay for it.

In the present form of the action the question is, whether there was a subsisting contract between the parties in regard to the lum-

ber, or not, and the doctrine of equitable estoppel has no application to the case.

If not originally liable by reason of a contract of some sort, the defendants can not be made so because of their having resumed possession of the premises with its improvements, upon the surrender of their tenant.

It is true they thus derive some advantage from the materials furnished by the plaintiff, but that can not be avoided, as it is impossible for them to reject, or restore to the plaintiff that benefit without a surrender of their own property; and this the law does not require them to make. Pollock on Contracts, 29. Nor under such circumstances would a promise to pay, made after the lumber had been furnished and used, be binding on them, since it would be purely gratuitous and as such would make no contract.

For the reasons suggested, this court is of the opinion that the defendants are entitled to have the cause tried by another jury; and this renders it unnecessary that we should consider other points made as to the evidence received and its effect, as they may not again arise.

Error.

Venire de novo.

The defendant discharged the contractor who was to build his house and who had employed the plaintiff to do the plumbing. The plaintiff, with the knowledge and consent of the defendant, continued the work and finished the plumbing. In an action for the value of such work it was held that the defendant was liable. Blount v. Guthrie, 99—93.

In a suit by an attorney for the value of his services, the court says: "If the plaintiff was employed by defendant as attorney to represent him, and he rendered services under such contract, he is entitled to recover what the services are reasonably worth. Simmons v. Davenport, 140—407. The plaintiff alleged a special contract for work at 6½ per cent, and also a *quantum meruit* for the same amount; the defendant alleged a special contract for \$1,200, and that this had been paid; the court instructed the jury that if they should find there was no special contract, they should then find what the work was reasonably worth on the implied contract. Burton v. Mfg. Co., 132—17. Plaintiff furnished material to build a church at the request of M, one of the trustees; the other trustees knew that the material was furnished, but supposed that M was paying for it himself and giving it to the church; if M had power to make the contract, the defendants were bound by the express contract, and if he did not have such power, the defendants by receiving and using the material were bound by an implied contract. Tull v. Trustees, 75—424. See 6 R. C. L., 589; Contracts, Cent. Dig., §§ 4-6, 121-129; Dec. Dig., §§ 4, 27.

2. As affected by the relation of the parties.

(9) YOUNG v. HERMAN,

97 N. C., 280, 1 S. E., 792—1887.

This was a civil action to recover compensation for services rendered by the plaintiff to the defendant's intestate.

Plaintiff was the daughter of the intestate and lived with him for about twenty years after she became of age. She was never married, and she lived with her father as a member of the family. Her mother died three or four years before her father, and she had the care of him until his death. His mind became unsound, he was in a feeble condition, and required much attention. There was no promise on the part of her father to pay her for her service, nor any facts to show an implied promise, other than that she was of age when she did the service and that the same was very burdensome.

MERRIMON, J. Generally when one person has done labor or rendered valuable services for another at the latter's request, either express or implied, the law implies a promise on his part to pay the former reasonable compensation therefor. Ordinarily, in the course of the business relations of men, they serve each other for a valuable consideration, and hence, in the absence of an express promise to pay, in such case, the person doing the services on the part of him receiving the benefit, there arises a presumption of such a promise.

But such a promise is not implied in all cases where one person does service for another, although the latter takes, and intends to take and have, benefit from it.

This presumption of fact may in some cases be rebutted, and when rebutted no such promise is implied, and no legal obligation to pay arises. Thus if the services were rendered as a pure gratuity or simply in discharge of a moral obligation, no such promise would be implied and no such presumption would arise. And so also, the relations of the parties may be such as to rebut such a presumption, as in case of parent and child. The law of nature imposes on the parent the duty to love, cherish, protect, help and encourage his offspring; to afford his children the benefits of family and domestic ties and proper training. To this end he labors for his children.

He is not prompted by motives of gain from them, nor does he expect or desire such compensation—the reward he wishes and hopes for is priceless and noble—it is, that his children shall fill the just measure of their being, and thus afford him gladness and satisfaction.

And the same law imposes on children filial duty, that of love, gratitude, obedience and reverence; and they are bound by the ties of nature, to aid, by such labor and services as they can do, or otherwise when need be, in the support of their parents, their home and family. Indeed, the father is entitled to the services of his child until he or she shall arrive at the age of twenty-one years. At that age the child becomes emancipated, that is, at liberty to leave the father's home, be free from parental control, and to seek his own fortune where and as he will, but such ties and obligations are not then completely broken.

The child never ceases to owe his parents honor and reverence, and also help, support and protection, where he or she needs these things, whether such wants be occasioned by misfortune or the infirmities of age. Such duties and obligations are founded in nature, and it is not to be presumed that they are abandoned. Hence, if the child, though of the age mentioned, shall continue to live with the father as a member and part of his family, and shall labor, or render services to the father without any agreement or understanding as to pecuniary compensation therefor, the law does not raise the presumption of a promise to pay for the same, and the child can not maintain an action against the father in that respect.

In such case the presumption is, that the parties do not contemplate or expect the payment of wages on the part of the parent, or payment for board, lodging, apparel and the like on the part of the son or daughter.

This is the orderly course of the natural relation of parent and child; the law favors and takes notice of it, and does not hasten to conclude that they intend to treat each other as debtor and creditor; it presumes the contrary, but such presumption is not conclusive; it may be rebutted and the reverse of it established by proof of an express or implied agreement to the contrary. Such implied agreement may appear from facts and circumstances which show that both parties at the time the labor was done, or the services were rendered, contemplated and intended that pecuniary recompense should be made for the same. The mere fact that the child on attaining his majority, continued to labor for the parent as a member of the family for a long while, or that he did burdensome and disagreeable labor, is not sufficient evidence of itself to prove an implied promise to pay wages for it, although the extraordinary character of the labor might be pertinent evidence in aid of other competent evidence to raise such implication. Such implied promise may be proven by pertinent declarations of the parties in the presence of each other, and facts and circumstances inconsistent with a purpose on the part of the parent and child

that the latter should labor simply as a member of the father's family without wages for his labor, such as that the father had paid the child wages—had repeatedly done so—that the father declared his obligation and purpose to pay wages, had promised to do so; that the child had said in the presence of the father that he was working for wages and the father did not dissent; that the child had taken a part of the crop, sold the same on his own account with the father's knowledge and consent; that the child had paid for his own clothing, and the like evidence. Of course such evidence would be subject to proper explanation, and the opposing party might produce countervailing evidence.

This seems to us to be a correct and reasonable statement of the rule of law applicable in this and like cases, although it must be conceded that there is some diversity of decision on the subject.

The great weight of authority in this and other States is in favor of the rule as we have stated it above. Its correctness is plainly and approvingly recognized by Chief Justice Ruffin, in *Williams v. Barnes*, 14 N. C., 348; and afterwards, by Chief Justice Pearson, in *Hudson v. Lutz*, 50 N. C., 217. The case of *Hauser v. Sain*, 74—552, however, seems to be in conflict with what is said in the cases cited above, although the learned Chief Justice who delivered the opinion of the court in that case, delivered that in *Hudson v. Lutz*, *supra*. See Schouler on Dom. Rel., 269, and the numerous cases there cited.

The court below simply told the jury "That when one person renders services to another, the law implies a promise to pay for the same what they are reasonably worth, and that the jury, in passing upon the first issue, have the right to consider that the plaintiff was the daughter of the house, the manner in which she was boarded, provided for and treated, and if they believe that such board, treatment and provision was what her services were reasonably worth, they should allow her nothing; but if from the old man's mental and physical condition, they find that she rendered unusual and unpleasant services, and that these services were not compensated for by her board, treatment, etc., they could allow whatever such services were, according to the evidence, reasonably worth during the three years before suit brought, over and above what was received."

The court thus in effect ignored the relation of parent and child and passed by the rule of law applicable, omitting any allusion to the important and pertinent question whether or not there was an agreement, express or implied, between the plaintiff and her father in his lifetime, that she should have pecuniary compensation for the labor she did. In this there is error. The jury should have been instructed substantially as indicated in this opinion. Indeed,

the court might, if the whole of the evidence before the jury was sent up as part of the case on appeal, have told them that accepting the evidence as true, the plaintiff could not recover, and they ought to render a verdict in favor of the defendant.

There must be a new trial.

In *Williams v. Barnes*, 14—348, the plaintiff was the son of the intestate and sued the estate for services rendered as overseer for his mother for two years after he came of age. *Ruffin, C. J.*, says: "Such claims, without probable evidence of a contract, ought to be frowned on by courts and juries. To sustain them tends to change the character of our people, cool domestic regard, and in the place of confidence, sow jealousies in families." The principle in the text above is acted on in the following cases: *Mother and son, Avitt v. Smith*, 120—392; *father and daughter, Stallings v. Ellis*, 136—69; *stepfather and stepdaughter in same family, Hussey v. Rountree*, 44—110; *grandfather and illegitimate grandson in the same family, Hudson v. Lutz*, 50—217; *grandfather and granddaughter in same family, Dodson v. McAdams*, 96—149; *stepfather and stepchildren in same family, Mull v. Walker*, 100—46; *son-in-law and mother-in-law in one family, Callahan v. Wood*, 118—752; *uncle and nephew in one family, Hicks v. Barnes*, 132—846.

In *Hauser v. Sain*, 74—552, the court held that the relation of grandfather and granddaughter in one family was not sufficient to rebut the presumption of contract, but this is in conflict with the cases above, and has been overruled in *Miller v. Lash*, 85—51. In *Whitaker v. Whitaker*, 138—205, plaintiff was grandson of intestate, and did not live with him but supported himself; this relation did not rebut the presumption of a promise to pay.

In the following cases there was some agreement as to compensation: A son-in-law who was to support the father-in-law for certain property, could not recover for extra care and trouble, *Peele v. White*, 74—480; niece rendered services to be compensated for in uncle's will, and no will was made, *Lawrence v. Hester*, 93—79; service rendered in the family to be paid for in will, and this was not done, *Miller v. Lash*, 85—51; grandson lived with grandfather after he was of age, upon agreement to receive part of the estate, and no provision was made for him, *Lipe v. Houck*, 128—115; services rendered by son-in-law upon agreement which intestate failed to comply with, *Whetstine v. Wilson*, 104—385; where a deed made to son-in-law as consideration for services was set aside by decree of court, the claim for service was revived, *Davis v. Duvall*, 111—422; where a daughter was to remain with her father during his life and receive one-fourth of his property, if she failed to get this and performed her part she could recover for her services, *Tussey v. Owen*, 139—457.

Some of the cases above seem to hold that blood relationship alone may rebut the presumption of implied contract; but it is the "one-family relation" which overcomes that presumption. *Winkler v. Killian*, 141—575; *Dunn v. Currie*, 141—123; 15 A. & E. Enc., 1083; 21 *Ibid.*, 1061; 2 Page Cont., secs. 778-784; *Mordecai's Lectures*, 109 to 114.

For further discussion and illustration, see *Henderson v. McLain*, 146—329; *Freeman v. Brown*, 151—111; *Spencer v. Spencer*, 181 Mass., 471, 63 N. E., 947; *Disbrow v. Durand*, 54 N. J. L., 343, 33 A. S. R., 678; *Mark v. Boardman*, 28 Ky., 855, 89 S. W., 481, 1 L. R. A. (N. S.), 819; *Hodge v. Hodge*, 44 Wash., 196, 91 Pac., 764, 11 L. R. A. (N. S.), 873, subject note; 40 Cyc., 2813; *Contracts*, Cent. Dig., sec. 130; Dec. Dig., secs. 4, 27; wife performing service for supposed husband, *Cooper v. Cooper*, 147 Mass., 370, 17 N. E., 892, 9 A. S. R., 721; officer performing service for corporation, *Caho v. R. R.*, 147—20; 3 L. R. A., 378.

Sec. 3. Implied contract (in law). Quasi contract.**(10) BAHNSEN v. CLEMMONS,**

79 N. C., 556—1878.

This was a civil action for money had and received. The facts are sufficiently stated in the opinion. There was a verdict and judgment for the plaintiff, and defendant appealed.

SMITH, C. J. The plaintiff's intestate, O. A. Keehn, for several years prior and up to June 1, 1861, held the office of postmaster at Salem, and as such had received and then held the sum of three hundred and thirty dollars and twenty-two cents, moneys belonging to the government of the United States. The defendant had entered into divers contracts for carrying the mails, under which there was a much larger sum due him from the postoffice department.

The balance in the intestate's hands had been from time to time, under orders of the department, paid over to the defendant and his receipts taken therefor. The defendant applied to the intestate to pay over this sum to him, and the intestate refused to do so unless directed by the postoffice department of the newly formed government of the Confederate States which had then assumed and was exercising control over the mails and postoffices in this State. The defendant procured the required order, and on presenting it the entire amount was, in the spring of 1862, paid over to him by the intestate. After the close of the war and the restoration of the authority of the United States, the defendant made demand and collected from the postoffice department payment in full for all his services as mail carrier up to June 1, 1861, no deduction being made for the sum paid him by the intestate. The intestate has also been compelled to account for the same money and has paid it to the United States. This action is instituted to recover the amount paid to the defendant, as paid without consideration, and in breach of defendant's contract to apply the same to the debt due him from the United States, and in exoneration of the intestate's liability therefor.

The defendant has thus twice received payment for his services in part, once from the intestate and again from the United States. The intestate has twice paid the money, once to the defendant and next under compulsion to the United States. It is as inequitable for the one to receive and retain the double payment as it is wrong that the other who has twice paid his money should lose it and be without remedy. The inequality will be corrected and the balance adjusted by the defendant's refunding what he has received and

improperly diverted to his own use. This result, in itself so reasonable and just, can be attained upon well-settled principles of law applicable to an action for money had and received.

"When the defendant," says Mr. Greenleaf, "is proved to have in his hands the money of the plaintiff which *ex equo et bono*, he ought to refund, the law conclusively presumes that he has promised so to do, and the jury are bound to find accordingly; and after verdict the promise is presumed to have been actually proved." 2 Greenl. Ev., sec. 104. The count for money had and received which in its spirit and objects has been likened to a bill in equity, may in general be proved by any legal evidence showing that the defendant has received or obtained possession of the money of the plaintiff which in equity and good conscience he ought to pay over to the plaintiff." *Ibid.*, sec. 117.

The plaintiff's right to recover is resisted on two grounds,—that the payment was voluntary, and that the transaction was itself illegal, and the law refuses its aid to either.

It is true the intestate paid the money of his own accord, but he did so at the instance of the defendant, and it was to be applied to the discharge *pro tanto* of his claim against the United States. Had the defendant thus applied the money, and this he should have done or offered to do in the settlement of his claims, the intestate would have been relieved of his own liability. By failing to give the credit and collecting his whole debt, he left the plaintiff exposed to the demand of the government, which he was again compelled to pay. This was a breach of the agreement and such a misuse of the fund as entitled the plaintiff to maintain his present action.

We are not able to see any force in the objection founded upon an alleged illegality in the transaction. The intestate simply undertakes to appropriate moneys in hand belonging to the United States to the payment of a recognized debt due by the United States. The act may have been and indeed was unauthorized, but we can discover no trace of illegality in it. The indebtedness was incurred under the regular operations of the government in the administration of the mail service, and an attempted though unwarranted adjustment between these parties can in no just sense be affected by the civil commotions in the midst of which it occurred. The plaintiff is in our opinion entitled to recover.

No error.

Affirmed.

(11) BRITTAİN v. PAYNE,

118 N. C., 989, 24 S. E., 711—1896.

This was a civil action before a Justice of the Peace, carried by appeal to the Superior Court.

The plaintiff alleged that he was the owner of certain walnut timber which he had purchased from the defendant, and that the defendant had sold \$160 worth of it and got the money, and thereby became indebted to the plaintiff in that amount, which in law the defendant agreed to pay. The defendant contended that the action was *in tort* and moved to dismiss the same for want of jurisdiction in the Justice. The plaintiff contended that the action was *in contract* for money had and received, and that the tort, if any, was waived. His Honor, being of opinion with the defendants, dismissed the action, and the plaintiff appealed.

CLARK, J. Where property is tortiously taken and sold, the owner may waive the tort and maintain an action to recover the money realized from the sale by the defendant. *Lumber Co. v. Brooks*, 109—698; *Wall v. Williams*, 91—477. And this is clearly what the plaintiff did by his complaint in this case. Every intendment being in favor of jurisdiction, if the complaint could have been construed as being either for the tort or to recover the money received by the defendant, this being an action before the Justice, the court would construe it to be an action on the implied contract in favor of the jurisdiction. *Lewis v. R. R.*, 95—179; *Stokes v. Taylor*, 104—394; *Fulps v. Mock*, 108—601.

Error.

See also *Jones v. Baird*, 52—152; *Bullinger v. Marshall*, 70—520; *McDonald v. Cannon*, 82—245; *Robertson v. Dunn*, 87—191; *Logan v. Wallis*, 76—416; *Olive v. Olive*, 95—485; *Edwards v. Cowper*, 99—421; *White v. Eley*, 145—36; *Manning v. Fountain*, 147—18, Rem., 666; *Dusenbury v. Spier*, 77 N. Y., 144; *Force v. Haines*, 17 N. J. L., 385; *Harty v. Polakow*, 237 Ill., 559, 86 N. W., 1085.

A contract implied in law is also called a constructive contract and quasi contract. It is not really a contract because the element of consent is wanting, but the remedy was by an action *ex contractu* as distinguished from an action *ex delicto*. Where the consent is reasonably inferred from the conduct of the parties, it is a contract implied in fact; where such consent can not be inferred, the law imposes the obligation, as if there had been consent, to prevent injustice. 15 Am. & Eng. Encyc., 1078; 9 Cyc., 242; *Woods v. Ayres*, 39 Mich., 345, 33 A. R., 396; 6 R. C. L., 588; *Pothier*, 72.

"Quasi contracts fall under three classes: 1. Obligations founded upon a record as a judgment; 2. Obligations founded upon a statutory, or official or customary duty; 3. Obligations founded upon the fundamental principle that no one ought unjustly to enrich himself at the expense of another." *Clark on Contracts*, p. 533. See also 2 Page on *Contracts*, sec. 771 *et seq.*

Other cases coming under this class of contracts are: *Necessaries* furnished to an infant, *Hyman v. Cain*, 48—111; or to a lunatic, *Rich-*

ardson v. Strong, 35—106; money paid to the use of another, Springs v. McCoy, 120—417; or by mistake, Hauser v. McGinnas, 108—631; money collected by one of two joint obligees, Kearns v. Heitman, 104—332; money collected that belongs to another, Horton v. Holliday, 6—111; goods furnished, Carter v. McNeely, 23—448; funeral expenses paid by one not administrator, Ray v. Honeycutt, 119—512; Gregory v. Hooker, 8—394; Parker v. Lewis, 13—22; Ward v. Jones, 44—127; Barbee v. Green, 86—158; money had and received, Davison v. Land Co., 126—704; Board of Education v. Henderson, 126—689. See also Luton v. Badham, 127—96, *post* 64; Howell v. Solomon, 167—588; Rem., 320—327, 658—669.

Sec. 4. Offer and acceptance.

1. Explained.

(12) ELKS v. INSURANCE CO.,

159 N. C., 619, 75 S. E., 808—1912.

This is an action to recover damages for breach of an alleged contract to lend the plaintiff \$1,000. The application was not introduced in evidence, and there is nothing to indicate the terms of the loan or the time when it was to be payable. The facts sufficiently appear in the opinion. From a judgment of nonsuit the plaintiff appealed. Affirmed.

ALLEN, J. This appeal presents one question for our decision, and that is, whether the evidence introduced by the plaintiff, construed most favorably for him, establishes a contract between him and the defendant. . . .

It is elementary that it is necessary that the minds of the parties meet upon a definite proposition. "There is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense. A contract requires the assent of the parties to an agreement, and this agreement must be obligatory, and, as we have seen, the obligation, in general, be mutual." 1 Par. Cont., 475.

If the alleged contract is made by conversations and correspondence, the whole must be considered, and although certain parts taken alone appear to constitute a binding agreement, if the whole correspondence and negotiations show that there were other terms contemplated by both parties, as essential to the proposed contract, on which they fail to agree, there is no contract. *Hussey v. Horne-Payne*, 4 App. Cas., 312. The leading opinion in this case was written by Lord Cairns, and Lord Selborne concurring, sums up the conclusion of the court as follows: "The observation has often been made that a contract established by letters may sometimes bind the parties who, when they wrote those letters, did not imagine that they were finally settling the terms

of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement."

If the minds of the parties meet upon a proposition, which is sufficiently definite to be enforced, the contract is complete, although it is in the contemplation of the parties that it shall be reduced to writing as a memorial or evidence of the contract; but if it appears that the parties are merely negotiating to see if they can agree upon terms, and that the writing is to be the contract, then there is no contract until the writing is executed. *Winn v. Bull*, 7 Ch. D., 31; *Pratt v. R. R.*, 21 N. Y., 308; *Miss. Steam. Co. v. Swift*, 86 Me., 248, 41 A. S. R., 553; *Rankin v. Mitchem*, 141 N. C., 280. . . .

Contracts are usually made by an offer by one party and an acceptance by the other; and it is in this way, the plaintiff contends, a contract was completed between him and the defendant. When an offer and acceptance are relied on to make a contract, "the offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer intended merely to open negotiations which will ultimately result in a contract, or intended to call forth an offer in legal form from the other party to whom it is addressed." 1 Page Cont., sec. 26. . . .

"The offer, even if intended to create legal relations, must be so complete that upon acceptance an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not. An offer in which the price is not fixed, and yet is so specified that it is evidence that the parties did not intend merely whatever should be a reasonable compensation, is not definite enough." 1 Page Cont., sec. 28. "The offer must not only be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not. If no breach of the contract could be assigned which could be measured by any test of damages from the contract, it has been said to be too indefinite to be enforceable, and this vice is usually due to the form of the offer." 1 Page Cont., sec. 28.

The same principle is declared in *Tanning Co. v. Telegraph Co.*, 143 N. C., 378, in which Justice Brown, speaking for the court, says: "The offer must be distinct as such, and not merely an invitation to enter into negotiations upon a certain basis. Wire

Works v. Sorrell, 142 Mass., 442; Beaupre v. Tel. Co., 21 Minn., 155; 24 A. & E. Encyc., 1029, and cases cited. Again the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract. McCaw Manfg. Co. v. Felder, 115 Ga., 408; 24 A. & E. Encyc., 1030, n. 1., and cases cited. . . . Clark Cont., sec. 29."

If the minds of the parties have met, and the terms have been agreed to, it does not always follow that a contract is complete and such a one as can be enforced, although not illegal, as the law demands that the terms shall be definite and certain, or capable of being made so. Silverthorne v. Fowle, 49 N. C., 363; Spragins v. White, 108 N. C., 453; Thomas v. Shooting Club, 123 N. C., 287; Price v. Price, 133 N. C., 515. . . .

Having determined the elements entering into a completed contract under conditions existing between the plaintiff and the defendant, let us see if the plaintiff has met the requirements of the law. We are of the opinion he has not. 1. When all the evidence is considered, including the correspondence, it amounts to no more than negotiations for a contract, and the conduct of the plaintiff shows that he so understood it. . . . 2. No promise on the part of the defendant, express or implied, to lend the plaintiff \$1,000 is proven. The approval by the finance committee, if made, was not such. It is merely a safeguard adopted by the defendant as preliminary to a loan. . . . 3. The agreement, as contended for by the plaintiff, shows that the transaction was not completed, and that other terms were to be agreed to, or it is so indefinite that it can not be enforced.

The plaintiff says he offered to borrow \$1,000 of the defendant, and that the defendant accepted his offer. It is agreed that a note and mortgage were to be executed by the plaintiff to consummate the contract, but he tendered neither to the defendant. The reason he did not is obvious. He did not know how to write the note and mortgage, and no lawyer could have prepared them, because stipulations necessary to a complete contract had not been discussed or agreed to, to wit, the time the loan was to run. It is certain the plaintiff did not intend to borrow \$1,000, payable one day after date, because he says he needed the money to use in payment of debts, in repairing a mill, and in cultivating crops, and if not payable one day after date, when was it to be due? Suppose the defendant had said: "Prepare your note and mortgage, and I will lend you the money, payable in two months," or three months or six months; is it not certain that the plaintiff had the right to say: "I do not want the money on such short time, and have not promised to take it;" and if the plaintiff had said the note must become due one year or two years from date, that

the defendant could have declined to lend on such terms, because it had not promised to do so. If so, terms which were necessary to complete the contract had not been agreed to. We are of opinion that no contract has been established, and that the judgment of nonsuit was properly entered.

Mere promissory expressions, resulting from excitement, strong feeling or anxiety, do not result in contractual obligation, though accepted, *Stamper v. Temple*, 6 Humph., 113, 44 A. D., 296; nor does the mere statement of a fact have that effect, *Williams v. Brickell*, 37 Miss., 682, 75 A. D., 88; *Hopson v. Brunwankel*, 24 Tex., 607, 76 A. D., 124; *Thruston v. Thornton*, 1 Cush., 89.

2. Offer must be communicated.

(13) *BURNS v. ALLEN*,

33 N. C., 25—1850.

NASH, J. The defendant sold to the plaintiff a tract of land for a specific sum of money, and the deed contained a covenant for quiet enjoyment. After the conveyance the land was surveyed according to the metes and bounds contained in it, when it was discovered that it covered twenty-two acres of land owned by the plaintiff. This fact was communicated to the defendant by a witness in the case, who was requested by him to tell the plaintiff he did not wish to be run to any costs, but was willing to pay for the land. To other witnesses he stated he did not wish Burns to sue him; he would do what was right; he was willing to pay the value of the land. The action is in assumpsit and the declaration contains two counts. The first is on a promise to pay by the defendant, in consideration of forbearance on the part of the plaintiff to sue, to pay the plaintiff the value of the land. The second is on a promise to indemnify the plaintiff for his loss in purchasing his own land. There is nothing in the case to show that the plaintiff and defendant ever entered into any agreement respecting the land, after the execution of the conveyance; or that after that time they ever had any communication on the subject. The case presents simply an offer on the part of the defendant to settle in the way indicated by him, without any action on the part of the plaintiff acceding to it, or without any evidence to show that it was ever made known to him. Neither count in the declaration is sustained. An assumpsit is a contract, which requires the assent of both the contracting parties. This was a mere offer to make one, which might have been withdrawn by the defendant at any time before it was accepted by the plaintiff. *Routledge v. Grant*, 4 Bing., 653. Judgment affirmed.

(14) PHIFER v. R. R. CO.,

89 N. C., 388, 45 A. R., 687—1883.

Civil action for loss of goods. Judgment for plaintiff, and defendant appealed.

SMITH, C. J. The plaintiffs, in the month of September, 1880, placed in the custody of the defendant company (Carolina Central R. R.), at Lincolnton, for the transportation over its and the associate roads and line of steamers, forming what is known as the "Seaboard Air Line," and delivery to Hopkins, Dwight & Co., consignees at New York, in different lots, 18 bales of cotton, taking at each time receipts or bills of lading (which contained, among other things, the words, "subject to the conditions stated upon this receipt, and to which, by the acceptance thereof the shipper assents," the opinion copying the receipt). On the reverse side of the receipt, among other conditions, was one in these words:

"It is further stipulated and agreed that in case of any loss, detriment or damage done to, or sustained by, any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage; and the carrier so liable shall have the benefit of any insurance that may have been upon or on account of said goods."

"Notice.—In accepting this bill of lading, the shipper or other agent of the property carried expressly accepts and agrees to all its stipulations, exceptions and conditions."

It was shown and not controverted on the trial (if indeed such is not admitted in the paper bearing the signature of the respective counsel and set out in the transcript) that the goods were safely carried over the road of the defendant and delivered to the company whose road next connects with that of the defendant, and forms part of the line of the associated companies designated by the initial letters "S. A. L." on the receipt, and that thence they were also safely transported and delivered to the Old Dominion Steamship Company, the last link in the chain of communication, and were burned while on board of one of its steamers.

The complaint, containing two causes of action, charges in the first that the defendant, as a common carrier, for a valuable consideration contracted to carry the cotton from Lincolnton to New York over its own and the lines of the other companies, using the latter as agencies of its own for this purpose; and in the second, that the defendant, as one of a partnership association of common carriers, formed by itself and the Raleigh and Augusta Air Line

R. R., the Raleigh and Gaston R. R., the Seaboard and Roanoke R. R. and the Old Dominion Steamship Co., and constituting the Seaboard Air Line, on behalf of all undertook and agreed to convey the cotton safely along and over the entire route to its terminus in New York.

One of the plaintiffs testified to his having accepted the bill of lading after learning the charge of carriage, but did not read it nor give assent to its conditions, except by accepting it, and did not know what they were until after the cotton was burned.

One M. Duke, for the defendant, stated that he made no contract for transportation other than in the bill of lading, and that when the first one was taken out by the plaintiff, McBee, witness asked him if he had read it, to which he replied: "No, he had not; it was no use, as he would never get his pay, as it did not amount to anything anyway," and that the plaintiff had filled up one of the blanks in his own writing, as he had before in the bills issued to others. It is needless to set out more of the evidence in the view we take of the appeal.

In whichever capacity the defendant entered into the contract of carriage, assuming an individual or partnership obligation, it is outside of the common law liability attaching to common carriers over their own lines, and has its force in the terms and conditions of a special contract, and the plaintiffs must abide by such of them as are reasonable in themselves and not repugnant to public policy.

The condition entering into the contract, and to which the plaintiffs acceded by receiving the bill of lading, and to which their attention is called by an entry on the face of the paper is, that in case of loss the plaintiffs will look alone to the carrier to whose negligence the loss is owing for compensation in damages. The plaintiffs accept this condition, which places them in the same relation towards the separate carriers, associated to form a through line, and relieve the shippers of the necessity of having forwarding agents at each connecting point, with increased expense, delay and annoyance incident thereto, as if no such connection had been made among the several companies. In the latter case the shippers would be compelled to seek redress from the carrier in default, and the same remedies are reserved to them against the several companies united in forming a continuous line. Such an arrangement secures manifest advantages to shippers, and it does not seem to us unreasonable that they should be required to hold each carrier only responsible for loss from its negligence and omissions and not one for another, and this is all that the clause recited undertakes to accomplish. It is not a case of notice, but of contract; and the cases wherein the controversy has been, whether it has been brought to the knowledge of a party sending off his goods

or not, have no application, since transportation is undertaken on the face of the receipt, "subject to the conditions stated upon this receipt" and contained on the reverse side. . . .

The court erred in permitting the jury to eliminate the provision from a contract of which it formed a part, upon the ground that it was not in force unless read by or known to the plaintiffs, or to one of them, though the receipt upon its face directed attention to the conditions; and it was their own fault if they failed to look at them. Certainly this inattention of the plaintiffs can not change the terms of the agreement to the prejudice of the defendant, and deprive it of a defense under it.

For the erroneous rulings against the defendant the verdict must be set aside and a new trial awarded, and it is so adjudged. Let this be certified.

Part of the above case has been omitted, which deals with the validity of the contract as exempting from liability for negligence, and this is treated under the case of *Capehart v. R. R.*, *post*.

The intention of the parties must be communicated by word or act, and therefore a person can not accept an offer which has not been communicated to him. 9 Cyc., 252. If the act is voluntary, and the other party receives the benefit without having an opportunity to accept or reject, he is not liable. 15 Am. & Eng. Encyc., 1080; 1 Page on Contracts, secs. 30, 31, 774, 775, 776; Clark on Contracts, p. 18; *Bartholomew v. Jackson*, 20 Johns., 28, 11 A. D., 237, Rem., 648; *Caldwell v. Eneas*, 2 Mill (S. C.), 348, 12 A. D., 681; *Seals v. Edmondson*, 73 Ala., 295, 49 A. R., 51.

For the purposes of the law, "an offer is communicated when it is brought to the attention of the adversary party in such a manner that by the use of ordinary intelligence he can not help knowing its terms." 1 Page on Contracts, p. 52.

(15) NORMAN v. R. R. CO.,

161 N. C., 330, 77 S. E., 345, Ann. Cas., 1914 D, 917—1913

This was an action for damages for the wrongful expulsion of the plaintiff from the defendant's train. The ticket was paid for at the regular rate, and contained printed matter on its face with the following conditions, among others: "Station stamped on back, to station opposite point in margin below." "Void if it shows any alterations, erasures, or is mutilated in any manner, or if B. C. punch is in any other than place designated." The agent failed to stamp the station on the back; the conductor refused to recognize the ticket, and put the plaintiff off. Judgment for the plaintiff, and the defendant appealed. Affirmed.

ALLEN, J. The plaintiff paid the usual and customary fare for his ticket, and was granted no right or privilege in consideration of a reduced rate. Under these circumstances the ticket was in the nature of a receipt for the passage money, and its office was to furnish evidence to the agents of the company that the bearer

was entitled to be carried. It was *prima facie* evidence that the holder had paid the regular price for it, and had the right to be transported, and was evidence of an agreement on the part of the defendant to carry him to his destination for a consideration paid. 1 *Fet. Car.*, sec. 275; *Boyd v. Spencer*, 103 Ga., 146. The plaintiff performed his part of the contract and was entitled to a valid ticket, and in the absence of evidence of assent on his part prior to or at the time of the purchase, was not bound by a stipulation rendering the ticket invalid, as there was no consideration to support the stipulation.

The Supreme Court of Tennessee, speaking of the question in *R. R. v. Turner*, 100 Tenn., 223, says: "We are also of opinion that the mere stamping or printing of a limitation or condition upon the back or face of a ticket, and the acceptance of such ticket by a passenger, without more, is not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation and his assent thereto when he purchases the ticket. It can not be presumed that every person buying a railroad ticket, for ordinary and general use, will, in the hurry and bustle of travel, stop to read and critically inspect his ticket. As a matter of fact, but little opportunity is afforded him to do so. He generally takes his place in the crowd at the ticket window, produces and hands over his money with a request for a ticket to destination. His money is received. The ticket is produced, and, after being stamped, is handed to him through the ticket window. He has had no opportunity to see what is upon it, and has no time, in the rush, to stop and read and consider what may be printed or stamped on its face or back, and when he has paid full fare there is no occasion for his doing so, inasmuch as he can safely rely upon the contract which the law makes for him. Ordinarily, local tickets do not generally contain any terms of contract, and are not intended to do so. They are mere tokens to the passenger and vouchers for the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, very much in the nature of baggage checks. The contract is in fact made when the ticket is purchased, and if it is different from what the law would imply, it must be so stated and assented to when the ticket is delivered. . . . This rule, which we consider to be settled by the weight of authority and by reason, by no means prevents a railroad company from selling special tickets for special trains with limitations and conditions, such as excursion, round-trip, commutation, and mileage tickets, when the conditions and limitations are known to the purchaser and assented to by him orally or in writing, and he has paid for such ticket less than the usual fare. When tickets are sold at re-

duced rates, it has been very wisely said that the purchaser should, in consideration of such reduced fare or greater privileges, expect and look for some conditions, limitations, and terms different from those attaching to tickets generally, and be on his guard to become informed of them. But there is no such obligation upon the ordinary passenger, who pays the usual or full fare and asks for no reduced rates or special privileges, and he has a right to expect an unlimited ticket." We quote at length from the opinion because the rule with its limitation is stated clearly and accurately.

Nor was there anything on the ticket to notify the plaintiff or to indicate to him that he was entering into a contract by which the ticket delivered to him would be invalid if the station at which it was issued was not stamped on the back, and while common carriers may make reasonable rules and regulations, they can not bind persons dealing with them by special contracts of which they have no notice, and not contained in the writing. . . .

The ticket does not say it will be void if the station is not stamped on the back, nor is there anything to suggest that there was any obligation on the plaintiff except to present it; and as it was evidence that the regular fare had been paid, and required no identification of the purchaser, we fail to see how the defendant could have suffered loss by accepting it. . . . If, however, the statement on the ticket is contractual and is equivalent to a stipulation that the ticket will be invalid unless the station at which it was issued is stamped on the back, there is no evidence that the plaintiff had notice of such requirement, and as he paid for a valid ticket, he had the right to assume that the agent had given him what he had paid for. *Wood Railways*, vol. 3, sec. 349; *R. R. v. Turner*, 100 Tenn., 223; *Head v. R. R.*, 79 Ga., 358; *R. R. v. Dougherty*, 86 Ga., 744; *Ellsworth v. R. R.*, 95 Iowa, 107. . . .

No error.

Plaintiff bought a special excursion ticket from Wilmington to Washington on June 13 to return June 17, at greatly reduced rate; in attempting to return on it June 18, and on a different train, he was put off the train. The court says that under the circumstances he was bound by the terms of the ticket and by the regulations of the company as to such excursions. *McRae v. R. R.*, 88—526. A person is charged with notice of the printed matter on a telegraph blank filled out by him, but this will not exempt the company from liability for negligence. *Pegram v. Tel. Co.*, 97—p. 61; *Shaw v. Tel. Co.*, 56 L. R. A., 486.

As to notice of terms, there is a distinction between the ordinary passenger ticket which is regarded as a mere voucher or token and a ticket which is signed and purports to be the entire contract between the carrier and the passenger. *Thomas v. R. R.*, 131—p. 593; *Clark on Contracts*, p. 19. For a full discussion of the effect of terms appearing on a passenger ticket, see 1 *Page on Contracts*, sec. 31; 5 *Am. & Eng. Encyc.*, p. 612; also vol. 28, pp. 155, 174; *The Majestic*, 166 U. S., 375, overruling the same case in 23 L. R. A., 746; *Trezona v. R. R.*, 43 L. R. A., 136; *Watson v. R. R.*, 49 L. R. A., 454; *Fonseca v. Steamship Co.*, 12 L. R. A., 340, 153 Mass., 553, 27 N. E., 665, 25 A. S. R., 660; *McMillan*

v. R. R., 16 Mich., 79, 93 A. D., 208; St. L. R. R., v. Weakly, 50 Ark., 397, 7 A. S. R., 104; Melody v. Gr. N. R. R., 25 S. Dak., 606, 127 N. W., 543, Ann. Cas., 1912C—727, 6 R. C. L., 627; for condition in mileage book, see Mason v. R. R., 159—183; Harvey v. R. R., 153—567; Dorsett v. R. R., 156—441; Hallman v. R. R. (N. C.), 85 S. E., 298.

3. Acceptance necessary.

(16) GREEN v. GROCERY CO.,

153 N. C., 409, 69 S. E., 412—1910.

The plaintiff seeks to recover \$400, paid to defendants in negotiations in regard to renting a hotel. In his letter of remittance the plaintiff says: "On receipt of draft wire me . . . confirming deal." The plaintiff received no telegram confirming deal, and none was ever sent. From a judgment against him the plaintiff appealed. New trial.

BROWN, J. . . . The plaintiff had a right to demand such confirmation and in the manner required by the letter containing the remittance. Until such confirmation was sent by wire there was no completed contract, and the plaintiff had a right to demand the money back. . . . As is said by the Supreme Court of the United States in Eliason v. Henshaw, 17 U. S., 288: "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either." Clark Cont., 36-39; Cozart v. Herndon, 114 N. C., 252; 1 Wharton Cont., 4; Gregory v. Bullock, 120 N. C., 263; 7 A. & E. Enc., 138. There being no evidence that the defendants had accepted and confirmed by wire the proposal to lease, as required by the letter transmitting the \$400, the plaintiff had the right to withdraw and to recover that sum with interest thereon as money had and received to his use. . . .

New trial.

4. Acceptance must be communicated.

1. IN GENERAL.

(17) COZART v. HERNDON,

114 N. C., 252, 19 S. E., 158—1894.

This is a civil action originally brought for specific performance of a contract for the purchase of land, and reported in 113 N. C., 294, as *Cozart v. West Oxford Land Co.* For the present question the facts are sufficiently stated in the opinion.

SHEPHERD, C. J. The general purpose of this action is stated in the opinion in this case when it was before us on a former occasion (113 N. C., 294), but in the present appeal the only question involved is whether the defendant, H. C. Herndon, was a stockholder in the codefendant company. His Honor instructed the jury that there was no sufficient evidence to establish such a relationship, and it is the correctness of this ruling which is alone presented for review.

No stock was issued to said Herndon, nor does it appear that his name ever appeared upon the books of the company, nor that he ever held himself out, nor was, with his knowledge, held out as a stockholder. Thompson on Stockholders, section 174. The secretary, treasurer and the said Herndon testified that the latter was not a stockholder, and it can not seriously be insisted that the mere suggestion of Herndon to James T. Cozart that he and his brother and brother-in-law ought to take stock in the company was in itself sufficient evidence to sustain the contention of the plaintiffs. The case, therefore, must be determined upon the effect of the correspondence between the company and the said Herndon. On the 15th of June, 1891, the company, through its president, addressed a letter to Herndon which contains the following language:

"We have considered the question as to the purchase of your fifty (50) acres, and while we think \$300 an acre rather high in view of the fact that under the arrangements suggested in the first of this letter we have only placed a value of \$200 per acre on the vacant Cozart property, yet we have decided to take the place for fifteen thousand dollars of the stock of the company, feeling that our joint interest will be promoted by concert of action. As several of our directors are from a distance we shall be glad to have a response from this at once."

On the same day Herndon replied as follows:

"As to my land adjoining the Philpott property, I think your company could very well afford to give me \$20,000 of your stock

for it. It would probably have a better effect here and also abroad than \$15,000. If, however, you fail to take that view of it, I will accept the offer of \$15,000 with this consideration, however, that I reserve, in making this transaction, all and every kind of wood and timber on the place for my own exclusive use and benefit."

At a meeting of the directors on the same day the following proceedings were had, as appears upon the minutes:

"On motion, the same (that is the proposition of Herndon) was accepted, and the treasurer directed to deliver stock upon receipt of deed, title being clear."

The defendant Herndon testified "that the condition upon which he proposed to sell to defendant company certain land (as set forth in his letter) was never accepted by said company, and that he withdrew his proposition to sell to said company about the 18th of March, 1892."

It does not appear that the resolution of the board accepting the proposition was ever communicated to said defendant, nor does it appear, as we have stated, that the stock was delivered, nor that title was made, nor, indeed, that any further action whatever was taken by either party in pursuance of the said correspondence.

It is well settled that in order to constitute a contract there must be "a proposal squarely assented to." If the proposal be assented to with a qualification, then the qualification must go back to the proposer for his adoption, amendment or rejection. If the acceptance be not unqualified, or go to the actual thing proposed, then there is no binding contract. A proposal to accept or acceptance based upon terms varying from those offered is a rejection of the offer. 1 Wharton on Con., 4. "The respondent is at liberty to accept wholly, or reject wholly, but one of these things he must do; for if he answer not rejecting, but proposing to accept under some modification, this is a rejection of the offer." 1 Parson on Con., 476. "It amounts to a counter-proposal, and this must be accepted and its acceptance communicated to the proposer, otherwise there is no contract." Pollock on Con., 10.

Applying these general principles to the facts before us, it is plain that there was no contract by which the defendant, Herndon, became a stockholder. The proposal of the company was to purchase the land for \$15,000 of its stock. Herndon's answer is not an acceptance, but a proposal to accept with the very important qualification that he is to reserve "all and every kind of wood and timber on the place for his own exclusive use and benefit." The acceptance of this proposal was never communicated to him, and after many months the proposal was revoked without objection, it seems, by the company.

We think His Honor was correct in holding that there was no evidence that the defendant, Herndon, was a stockholder.

Affirmed.

2. GUARANTY.

(18) COWAN v. ROBERTS,

134 N. C., 415, 46 S. E., 979, 65 L. R. A., 729, 101 A. S. R., 845—1904.

This was a civil action brought by Cowan, McClung & Co. against W. S. Roberts to recover the sum of \$2,000 alleged to be due by defendant on a guaranty.

The firm of Roberts Brothers owed the plaintiff the sum of \$1,742 for goods sold, and they wishing to purchase more, the plaintiff refused to sell to them unless they secured by guaranty the amount then due and what should become due afterward. The defendant then signed the following paper:

“Knoxville, Tenn., April 8, 1899.

“I hereby guarantee to Cowan, McClung & Co. any debts which Roberts Bros. now owe, or may owe in the future, to the extent of \$2,000. This obligation is to remain in full force until the debt now due Cowan, McClung & Co. is fully discharged and this agreement annulled in writing.

“(Signed)

W. S. Roberts.”

This was delivered to the plaintiffs, and they furnished Roberts Bros. goods to the amount of \$475. The firm became entirely insolvent, failed to pay either amount, and were declared bankrupts. Plaintiffs notified defendant of such default, and upon his refusal to pay, brought this action. The defendant claimed that he had signed the writing with the understanding that it was also to be signed by one J. J. Roberts, a third person, and Roberts Bros. had failed to get this signature; that he then directed Roberts Bros. to have his name erased, and also wrote the plaintiff that he would not be responsible longer. This letter was on July 7, and the goods had already been furnished, and plaintiffs claimed that they were furnished on this guaranty.

At the close of the testimony the court intimated that it would charge the jury to find the issue for the defendant, and the plaintiff submitted to a nonsuit and appealed.

WALKER, J. The defendant's counsel, in his able argument before us, relied upon three grounds of defense: 1. That there was no evidence that the plaintiffs had accepted the guaranty and notified the defendant of their acceptance. 2. That there was no consideration to support the guaranty as to the debt already due by

Roberts Bros. to the plaintiffs amounting to \$1,742.50. 3. That the guaranty was given upon a condition which was never performed, and that it is therefore void even in the hands of the plaintiffs.

A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance. *Carpenter v. Wall*, 20 N. C., 144. There is a well-defined distinction between a guaranty of payment and a guaranty for the collection of a debt, the former being an absolute promise to pay the debt at maturity if not paid by the principal debtor, when the guarantee may bring an action at once against the guarantor, and the latter being a promise to pay the debt upon condition that the guarantee diligently prosecuted the principal debtor for the recovery of the debt without success. *Jones v. Ashford*, 79 N. C., 172; *Jenkins v. Wilkinson*, 107 N. C., 707, 22 Am. St. Rep., 911. The guaranty may also be absolute in form, or one which binds the guarantor to pay, conditionally, or, at all events,—upon the default of the principal, or it may be in the form merely of an offer to become bound upon the default of the principal. In the former case, that is, where there is an absolute guaranty or an unconditional promise to indemnify against loss by the principal's default, no notice of acceptance by the guarantee is required, the liability of the guarantor being fixed and determined by the ordinary rules in the law of contracts. In the latter case, when the transaction takes the form of an offer merely to become responsible for the principal, notice of acceptance of the offer is of course necessary in order to charge the party, who makes the offer, as guarantor, and this is so because the minds of the parties have not met, there is no *aggregatio mentium* until the offer is accepted. There is a well-recognized distinction, therefore, between an offer or proposal to guarantee and a direct promise of guarantee. The former requires in some cases notice of acceptance, while the latter does not. When the offer to guarantee is absolute and contains in itself no intimation of a desire for, or expectation of, specific notice of acceptance, it may be supposed that the offerer has a reasonable knowledge that his guaranty will be accepted and acted upon, unless he is informed to the contrary. 2 *Parsons Cont.* (8 Ed.), ch. 2, sec. 4, and notes, where the subject is fully discussed. It is said that if the party distinctly and absolutely guarantees a certain line of credit, it presupposes some sort of a request for a guaranty, emanating from the guarantee, and for this reason no formal acceptance by the guarantee is necessary; but if it be only a proposition to guarantee the credits, and not a positive promise to guarantee them, the acceptance of the

proposition must, in some way, and within a reasonable time, be communicated before the guarantor can be held liable on it. Tiedman on Com. Paper, sec. 420.

In our case the guaranty is a direct and unconditional promise to answer for the default of the principal to the amount of \$2,000. The words of the contract are *in presenti*, "I do hereby guarantee," and superadded are the words, "This obligation to remain in full force." . . . Language could not be stronger to express the intention to become liable at once without any expectation of notice that the plaintiffs will accept the guaranty. It was not an offer, nor did it imply an offer merely, but it was in itself a complete and binding promise to guarantee, and needed only the sale of the goods by the plaintiff to make it otherwise effectual. 1 Parsons, *supra*, pp. 466, 467.

We can not distinguish this case from *Strauss v. Beardsley*, 79 N. C., 59, where the court says: "If the undertaking be to guarantee the contract which may be made, the obligation is not collateral and contingent, but absolute and unconditional, and no notice is necessary. . . . The undertaking is to pay a certain sum, and by the terms of the condition it is discharged only when the goods have been delivered under its provisions, by actual payment of the purchase price. If the goods are delivered, the contract is to pay for them, and a compliance with this condition is the only means of discharging the obligation. It thus became the duty of the intestate and his associates to ascertain for themselves if the plaintiffs furnished the goods and that they were paid for, and no notice or demand was necessary to charge them with the debt." See also *Walker v. Brinkley*, 131 N. C., 17.

In *Williams v. Collins*, 4 N. C., 382, this court drew the distinction between a guaranty that a certain person will be able to comply with the proposed contract and one wherein the promise is that he shall comply. In the latter case, which is ours, the court held that the guarantor "to all legal consequences, became pledged absolutely to the same extent as the principal debtor was bound, as soon as the guarantee parted with his property." In *Shewell v. Knox*, 12 N. C., 404, all the judges agreed that if the guaranty is absolute and addressed to an individual, no notice of acceptance is necessary, and one of the judges held that it was not even necessary when a letter of credit was given under the circumstances of that case. The general principle as to when notice of acceptance of an offer to contract becomes necessary is considered in the cases of *Crook v. Cowan*, 64 N. C., 743, and *Ober v. Smith*, 78 N. C., 313. The question as to notice of acceptance in cases of guaranty is very ably and exhaustively discussed, with a full review of the English and American authorities, in the case of *Wilcox v. Draper*,

12 Neb., 138, 41 Am. Rep., 763, and the conclusion is reached that when there is a direct promise of guaranty no notice of acceptance is required. *Allen v. Peck*, 3 Cush., at p. 242; *Powers v. Bumcratz*, 12 Ohio St., 273; *Bank v. Coster*, 3 N. Y., 212, 53 Am. Dec., 280; *Bank v. Phelps*, 86 N. Y., 484; 2 Addison Cont. (8 Ed.), p. 84 (star page 651). The case of *Gregory v. Bullock*, 120 N. C., 260, does not apply, as the court held there was no contract at all in that case, and what is said about the guaranty was with reference to the particular facts under consideration, from which it appeared that there was only "a proposal based upon an uncertain event." The guaranty in this case as to both the past and future indebtedness is evidenced by one and the same instrument and is supported by one and the same consideration, and we do not therefore see why the law applicable to the one should not also determine the liability in the case of the other.

We are of the opinion that the testimony of the defendant as to his interviews and communications with the principals, Roberts Bros., and his subsequent promise to pay for the goods after the guaranty had been executed by him, furnishes some evidence to show that he knew the guaranty had been delivered to the plaintiffs and that they were acting upon it, or intended to do so.

There was a sufficient consideration to support the guaranty as to the debt already due. The agreement as to the existing and the future indebtedness was indivisible, and was based upon one and the same consideration, which was that the plaintiffs should sell more goods to the principals to enable them to replenish their stock, which he did. It is not necessary that the consideration should be full or adequate, as in the case of *bona fide* purchasers for value. If there is any legal consideration it is sufficient. The promise of the guarantee to furnish the goods was such a consideration and supports the contract of guaranty. 1 Parsons, *supra*, pp. 466, 467.

The third ground of defense is not tenable. If the written guaranty was given to the principals upon condition that it should not be delivered to the plaintiffs until it was signed by J. J. Roberts and they delivered it in violation of the condition, and, thus, as is said in the case, practiced a fraud upon the defendant, the defendant is bound, as the plaintiffs did not participate in the fraud alleged, nor is it shown that they had notice of it. The liability of the defendant is founded upon the principle that where one of two persons must suffer loss by the misconduct or fraud of a third person, or by his breach of confidence, as in our case, the loss should fall upon him who first reposed the confidence or who by his negligence made it possible for the loss to occur, rather than on an innocent third person. The liability of the defendant in this respect is fully established by the case of *Vass v. Riddick*, 89 N.

C., 6. See also *Bank v. Hunt*, 124 N. C., 171; *State v. Lewis*, 73 N. C., 141, 21 Am. Rep., 461.

The plaintiffs agreed to sell the goods to the principals not upon the single consideration that the defendant would guaranty the payment of the price, but upon the further and additional consideration that he would guarantee also the payment of the existing indebtedness. He would not have sold but for the last consideration, and therefore by reason of the guaranty he has been induced to change his position, and should the guaranty, as to that indebtedness, be declared invalid, he will be prejudiced, as he no doubt would have taken immediate steps to collect his claim if the guaranty had not been given. It will be impossible for him now to save himself for the reason that the principals have become insolvent and have been adjudged bankrupts. We have said this much, though we do not concede that, in order to charge the defendant on the guaranty, it is necessary to show a change in the guarantee's position by which he may be prejudiced if the guaranty is held to be void.

We have not commented upon the evidence in this case, from which it appears that the defendant knew, on the day after the guaranty was given, that it had been sent to the plaintiffs and had not been signed by J. J. Roberts, and knowing this fact, and "mis-trusting" the principals, as he did, according to his own testimony, he delayed for nearly three months to notify the plaintiffs of the alleged condition annexed to the guaranty, and in the meantime they had sold the goods. When they refused to surrender their security, he finally agreed to pay the bill for the goods sold after the date of the guaranty. This was a clear case of negligence on his part, and the consequences of this negligence must be visited upon him and must not be borne by the plaintiffs, who are innocent parties. As said in *State v. Lewis*, *supra*, the defendant acted upon the assurance that another would do an act which he knew might be defeated or prevented by various accidents, and he must therefore take the risk of such assurance being fulfilled. He confided in the principals, Roberts Bros., and the condition that J. J. Roberts should sign with him was communicated to them alone. He failed to use ordinary precaution either to protect himself or to protect the guarantee. If the defendant, in any phase of the testimony, can be regarded as an innocent person in this transaction, it yet remains as an inflexible rule of the law that where one of two innocent persons must suffer, he, who has enabled a third person to occasion the loss, must sustain it. This is said to be a doctrine of general application, and is a most just and reasonable one. *State v. Lewis*, *supra*. To permit the defendant to avail himself of his defense to this action would also contravene that

other just and inflexible maxim of the law that no man shall take any advantage of his own wrong.

No question arises in this case as to diligence on the part of the guarantee in collecting the debt from the principal, as this is a guaranty of payment and not for collection, and, besides, the burden of proof in this respect would be on the defendant. The case shows that notice of the default of the principal was given, and demand made upon the guarantor before the suit was commenced.

Our conclusion is that there was error in the intimation of opinion by the court adverse to the plaintiffs, by which they were driven to a nonsuit. The judgment must therefore be set aside and a new trial awarded.

New trial. (MONTGOMERY, J., dissents in part.)

Definition of guaranty as given above in *Carpenter v. Wall*, 20—279. Here the defendant refused to endorse notes, but said "they are good," and it was held not to be a guaranty. See also *Andrews v. Pope*, 126—472.

Absolute guaranty.—A guaranty of payment is absolute to pay the debt at maturity, if not paid by the principal, and the guarantee may sue the guarantor at once if not paid. *Williams v. Springs*, 29—384; *Ashford v. Robinson*, 30—414; *Farrar v. Respass*, 33—170; *Strauss v. Beardsley*, 79—59; *Leach v. Fleming*, 85—447; *Jenkins v. Wilkinson*, 107—707; *Hutchins v. Bank*, 130—285; *Walker v. Brinkley*, 131—17; *Vorhees v. Porter*, 134—591; *Mudge v. Varner*, 146—147.

Conditional guaranty.—A guaranty of collection of a debt is conditional and requires the guarantee to be diligent in prosecuting the principal. *Ward v. Ely*, 12—372; *Shewell v. Knox*, 12—404; *Jones v. Ashford*, 79—172; *Everett v. Sykes*, 167—600.

Guarantor, surety and endorser.—A surety is bound with his principal as an original promisor, and may be sued with him; so may an endorser; but a guarantor makes his own special contract and is not a party to the debt guaranteed. A surety under seal may be discharged in three years, while a guarantor would be held for ten years. *Coleman v. Fuller*, 105—328; *Carter v. McGehee*, 61—431; *Andrews v. Pope*, 126—472; *Rouse v. Wooten*, 140—557.

Notice of acceptance.—In an offer of guaranty, a conditional guaranty, notice of acceptance is an essential part of the contract, and must be given within a reasonable time. *Shewell v. Knox*, 12—404; *Grice v. Ricks*, 14—62; *Adcock v. Fleming*, 19—225; *Reynolds v. Magness*, 24—26; *Lewis v. Bradley*, 24—303; *Spencer v. Carter*, 49—287; *Cox v. Brower*, 51—100; *Strauss v. Beardsley*, 79—59; *Gregory v. Bullock*, 120—260. Such notice is not required in an absolute guaranty. *Strauss v. Beardsley*, 79—59; *Walker v. Brinkley*, 131—17; *Wright v. Griffith*, 121 Ind., 478, 23 N. E., 281; *Thompson v. Glover*, 78 Ky., 193, 39 A. R., 281; *Deering & Co. v. Martell*, 21 S. Dak., 159, 110 N. W. 86, 16 L. R. A. (N. S.), 352, and subject note.

Notice of default.—Notice that the guarantee has failed to get the debt from the principal is required, unless the facts are within the knowledge of the guarantor or no loss has resulted from such failure by reason of insolvency, etc. *Lewis v. Bradley*, 24—303; *Baker v. Saunders*, 28—380; *Salem Mfg. Co. v. Brower*, 49—429; *Cox v. Brown*, 51—100; *Sutton v. Owen*, 65—123; *Myer v. Reedy*, 115—538; *Sullivan v. Field*, 118—358. In case of an endorser notice of dishonor must be given strictly, or the endorser is discharged; but a guarantor is discharged only so far as he can show loss. *Ashford v. Robinson*, 30—114; *Farrar v. Respass*, 33—170. Contribution between sureties grows out of implied contract and is not a guaranty. *Sherrod v. Woodard*,

15—360; Reynolds v. Magness, 24—26; Heyman v. Dooley, 77 Md., 162, 26 Atl., 117, 20 L. R. A., 257.

Diligence.—The guarantee must use reasonable diligence to collect the debt from the principal before resorting to the guarantor, unless it appear that such action did not result in loss to the guarantor. Williams v. Collins, 6—47; Towne v. Farrar, 9—163; Battle v. Little, 12—381; Beeker v. Saunders, 28—380; Spencer v. Carter, 49—287; Jones v. Ashford, 79—172; Shewell v. Knox, 12—404; Eason v. Dixon, 19—78; Cox v. Brown, 51—100; Myer v. Reedy, 115—538; Sullivan v. Field, 118—358. Laches may be waived, Ashford v. Robinson, 30—114, and does not apply to absolute guaranty. Walker v. Brinkley, 131—17.

Consideration.—A consideration is necessary in a guaranty, but the original consideration is sufficient, if the guaranty is made at the same time with the original debt; otherwise a new consideration is required. Green v. Thornton, 49—230; Carter v. McGehee, 61—431; Supply Co. v. Finch, 147—106.

A continuing guaranty may be revoked by giving notice. Strauss v. Beardsley, 79—59; Rouss v. Krauss, 126—667; Mfg. Co. v. Draughan, 121—88. A mere recommendation or expression of opinion is not a guaranty. Hughes v. Warehouse Co., 139—158.

As to whether such contracts are within the Statute of Frauds, see *post*.

For general discussion of the subject of guaranty, see 2 Parsons on Contracts, pp.3-31; Harriman on Cont., secs. 146-149; 20 Cyc., 1392; 14 Am. & Eng. Encyc., 1128; 4 L. R. A., 343, and notes; Brandt on Guaranty and Suretyship, sec. 205 *et seq.*; 1 Page on Cont., sec. 53; 2 Pars. Cont., 3 *et seq.*

5. Manner of acceptance.

1. BY CORRESPONDENCE.

(19) WHEAT *et al.*, Appellants, v. CROSS,

31 Md., 99, 1 A. R., 28—1869.

BARTOL, C. J. This suit was brought by the appellee (Cross) to recover the price of a horse sold to the appellants. The contract of sale was made by correspondence between the parties through the mails.

The facts of the case, so far as it is material to state them, were as follows: On the 23d of August, 1867, the defendants received the horse into their possession, to be sold on commission, at that time apparently sound and in good condition. On the 12th of September, 1867, they addressed a letter to the plaintiff, stating that the horse had been sick, but is doing well at this time, and offering \$140 for him, clear of all expenses, and saying: "You can draw on us at sight for \$140." This letter was received on the 15th or 16th of September; on the 16th, the plaintiff signified his acceptance of the offer by drawing on the defendants for \$140. The draft was sent on that day, and on the 17th, the defendants refusing to pay the draft, it was protested. On the 16th of September the defendants addressed a letter to the plaintiff, withdrawing their offer of the 12th, stating that "when they wrote

they did not think the horse was so bad, but since it had turned out to be 'farcy,' they would not buy it at any price," and directing him "not to draw on them for the money; that they will not pay the draft until they see how the horse gets." This letter was not received by the plaintiff till after he had accepted the offer contained in the letter of the 12th, by sending the draft.

In the argument of the case two positions have been taken by the defense. 1. That there was not such mutual assent between the parties as to constitute a binding contract. 2. That the offer by the defendants was made through mistake of a material fact as to the condition of the horse, and the nature of the disease under which it was suffering; and was withdrawn as soon as the mistake was discovered, and the acceptance thereof was not binding upon them.

On the first question we consider the law well settled, that where the parties are at a distance from each other, and treat by correspondence through the post, an offer made by one is a continuing offer until it is received, and its acceptance then completes the *aggregatio mentium* necessary to make a binding bargain. The bargain is complete as soon as the letter is sent containing notice of acceptance. This rule applies where the offer and acceptance are unconditional. The offer may be withdrawn, and the withdrawal thereof is effectual so soon as the notice thereof reaches the other party; but if before that time the offer is accepted, the party making the offer is bound, and the withdrawal thereafter is too late.

In this case it appears the defendants' letter of withdrawal was sent on the same day on which the notice of the plaintiff's acceptance of their previous offer was transmitted, and it has been argued that the onus is on the plaintiff to show that the sending of the acceptance preceded the sending of the withdrawal. This position is not correct; it is quite immaterial to inquire whether the defendants' letter of the 16th, or the draft of the same date, was first sent. Until the notice of the withdrawal of the offer actually reached the plaintiff, the offer was continuing, and the acceptance thereof completed the contract.

This point was expressly decided in *Taylor v. Merchants' Fire Ins. Co.*, 9 How., 390. That was a case arising upon an insurance contract, but the reasoning of the court on this question, and the principles decided, are applicable alike to all contracts made by correspondence between parties at a distance from each other. There the terms upon which the company was willing to insure were made by letter, and it was held "that the contract was complete when the insured placed a letter in the postoffice accepting the terms." The court says, page 400, "we are of opinion that an

offer under the circumstances stated, prescribing the terms of insurance, is intended and is to be deemed a valid undertaking on the part of the company that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail accepting them, and that it can not be withdrawn unless the withdrawal reaches the party to whom it is addressed, before his letter of reply announcing the acceptance has been transmitted. . . . The rule we have stated as governing the present case is supported by many adjudged cases, some of which are cited in the appellee's brief. Of these we refer to *Adams v. Lindsell*, 1 B. & Ald., 681; *Mactier's Admr. v. Frith*, 6 Wend., 103; *Dunlop v. Higgins*, 1 H. L. Cas., 381.

The second ground of defense which was chiefly relied on in the argument, that the defendants made the offer under a mistake of fact as to the actual condition of the horse, and were therefore not bound by it, is, in our judgment, altogether untenable. Such an error or mistake as that in no manner affects the validity of the contract. In a case where there is a mutual mistake of the parties as to the subject-matter of the contract, or the price or terms, going to show the want of a consensus *ad idem*, without which no contract can arise, such a defense may be made. But here the mistake was in relation to a fact wholly collateral, and not affecting the essence of the contract itself. The vendees can not escape from the obligation of their contract because they have been mistaken or disappointed in the quality of the article purchased. In the absence of a warranty the principle of *caveat emptor* applies, and the buyer takes the risk of quality upon himself.

Affirmed.

(20) UNION NAT. BANK v. MILLER *et al.*,

106 N. C., 347, 11 S. E., 321, 19 A. S. R., 538—1890.

This was a civil action to recover personal property alleged to have been wrongfully attached. Judgment for defendants, and plaintiff appeals.

Gregg, Garvey & Co., of Chicago, had shipped certain property to Charlotte, N. C., to their own order, but intended for Miller & Co. They drew on Miller & Co. and endorsed the draft in blank to the Union National Bank in Chicago, and the drawee failed to pay the draft. On November 25 they telegraphed Van Landingham, in Charlotte, "Wire best offer for sacked middlings, No. 2324, now at Charlotte." He replied November 26, "Nineteen dollars per ton. Must have reply early to-morrow." The firm replied by telegraph November 27, "Offer accepted." This message was received at Charlotte at 4:29 p. m. and delivered at 5:34

p. m. The goods were attached after the last telegram was sent but before it was received.

SHEPHERD, J. The only question necessary to be considered in disposing of this appeal involves the correctness of His Honor's instruction that the title to the property had, by reason of the telegraphic correspondence, passed out of the plaintiff, and into Van Landingham, at the time of the levy of the attachment. The property was in Charlotte, in the possession of a common carrier, and on the 26th of November, 1888, Van Landingham made the following offer by telegraph to the plaintiff's agent at Chicago: "Charlotte, N. C., November 26, 1888. To Gregg, Garvey & Co. Nineteen dollars per ton. Must have reply early to-morrow. Jno. Van Landingham." On the next day at 5:34 p. m., Van Landingham received a telegram from the said agent accepting the offer. This latter telegram was sent from Chicago before, but was not received by Van Landingham until after the levy of the attachment. His Honor held that the contract was complete when the telegram was sent from Chicago, and that, title having passed to Van Landingham before the alleged conversion, the plaintiff could not recover. In the cases of *Crook v. Cowan*, 64 N. C., 743, and *Ober v. Smith*, 78 N. C., 313, it was held that where there was a delivery to a carrier in pursuance of an "unconditional and specific" order, the contract was complete; but it has never been distinctly decided in this State whether, in the absence of such a delivery of the property, the mere dispatching of an acceptance by post or telegraph has the effect of consummating a contract at the time of such dispatching. Upon this point the authorities are conflicting. It is, however, unnecessary to decide the question in this case; for, granting the affirmative of the proposition, we are of the opinion that under the peculiar terms of this correspondence, and in view of the testimony, the court was not warranted in charging the jury that the title vested in Van Landingham at the time the telegram was sent. It does not appear that it was sent early in the day, according to the terms of the offer, and it was incumbent on the defendant to have shown this fact before he could avail himself of the principle contended for. "In our own law the effect of naming a definite time in the proposal is simply negative, and for the proposer's benefit; that is, it operates as a warning that an acceptance will not be received after the lapse of the time named. In fact, the proposal so limited comes to an end of itself at the end of that time, and there is nothing for the other party to accept." *Pol. Cont.*, 9; *Larmon v. Jordan*, 56 Ill., 204; *R. R. v. Bartlett*, 3 Cush., 224; *Mactier's Admr. v. Frith*, 6 Wend., 103; *Cheney v. Cook*, 7 Wis., 413. The principle is well illustrated by the following extract from the opinion of the

court in *Maclay v. Harvey*, 90 Ill., 525: "It was said by the Lord Chancellor in *Dunlop v. Higgins*, 1 H. L. Cases, 387: 'Where an individual makes an offer by post, stipulating for, or by the nature of the business, having the right to expect an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return of post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness such as may not be acquired where he is only endeavoring to excuse himself from a liability.'" This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer, and the words, "You will confer a favor by giving me your answer by return mail," do, in effect, "stipulate" for an answer by "return mail." The same principles apply to correspondence by telegraph. *Trevor v. Wood*, 36 N. Y., 307. Under this view of the law, which is well sustained both by reason and authority, the requirement of the offerer, *Van Landingham*, that he "must have a reply early to-morrow," can not be regarded otherwise than as a stipulation for an acceptance within that time; and, as the defendant has not shown a compliance with such stipulation, it must follow that there was error on the part of His Honor in charging the jury that the mere sending of the acceptance before the levy operated to transfer the title. The offer was limited to early in the day. The acceptance was not received until late in the evening. Even conceding that the contract would be complete from the sending of the dispatch, there is, as we have said, no testimony to show that it was sent within the time limited by the offer. The title, therefore, did not pass. *Benj. Sales* (3 Am. Ed.), 48, note. For these reasons we are of the opinion that there should be a new trial.

That the acceptance is complete when the letter is properly mailed accepting the offer, unless otherwise indicated in the offer, see *Taylor v. Merchat. Ins. Co.*, 9 How., 390; *Burton v. U. S.*, 202 U. S., 358, 384; 6 Ann. Cas., 378; *Adams v. Lindsell*, 6 E. R. C., 80; *Brauer v. Shaw*, 168 Mass., 198, 46 N. E., 617, 60 A. S. R., 387; *New v. Ger. F. Ins. Co.*, 171 Ind., 33, 85 N. E., 703, 131 A. S. R. 245; the same rule applies in the case of acceptance by telegraph. *Lucas v. Tel. Co.*, 131 Iowa, 669, 109 N. W., 191, 6 L. R. A. (N. S.), 1016, 110 A. S. R., 742. See generally 2 Kent Com., 477; 1 Page Cont., sec. 52; 1 Parsons Cont., 522; Clark Cont., 26; Pollock Cont., 34; 6 R. C. L., 611; 9 Cyc., 294; 7 A. & E. Enc., 135; Contracts, Cent. Dig., secs. 80, 119, 120; Dec. Dig., sec. 26.

2. BY MANNER INDICATED IN THE OFFER.

(21) CROOK v. COWAN,

64 N. C., 743—1870.

This action was brought to recover the price of two carpets furnished under the following circumstances:

On December 10, 1866, D. S. Cowan wrote to Walter Crook, of Baltimore, ordering two carpets, giving description, and saying, "I want good, durable carpets, and wish you to have them made up. You can forward them to my address at Wilmington, N. C., per Express, C. O. D., or else, advise me of the cost, and I will remit while you are having them made up." The plaintiff received this letter on December 14, and made no reply, but made up the carpets and shipped them as directed, by express, on December 21. On December 26, defendant telegraphed plaintiff inquiring about his order, and receiving no reply, on January 2, 1867, bought other carpets. On January 16, the plaintiff notified defendant that the carpets had been reported uncalled for by the express company, and asked him to take them out. The defendant replied, referring to the failure to receive any reply to his letter or telegram, and saying, "I called at telegraph office frequently from 26th December to 2d January, 1867,—seeking a reply, but received none. Concluding that my letter had miscarried, and consequently you did not understand the dispatch, I bought carpets in Wilmington and had them made up. Agreeable to the above facts, I can not think I am morally bound to take the carpets."

There was a verdict and judgment for the plaintiff, and the defendant appealed.

READE, J. If one writes to another, who has not offered his property for sale proposing to buy, the letter is of course nothing but an offer, and is of no force until the other answers and accepts the offer; then the contract is made. But if one holds his property out for sale, naming the terms, and another accepts the terms, the contract is complete; or, if one bids at an auction, and the hammer falls, the contract is complete; or, if one advertises, offering a reward for something to be done, as soon as the thing is done the contract is complete, and the reward is due. So, in our case, the plaintiff held himself out as a carpet manufacturer and vender, and offered his carpets for sale, and invited purchasers; and when the defendant sent him the unconditional order for carpets, that was an acceptance of his offer, and the bargain was struck, and the moment that the carpets were delivered to the express, the agent designated by the defendant to receive and trans-

port them and collect the bill, the delivery was made, and the property passed to the defendant. But, if that were not so, our case is stronger than that. Consider the case as if the first offer was made by the defendant to the plaintiff. The defendant knowing that the plaintiff was a carpet vender, sent him an unconditional order for carpets, specifying the express as the agent to receive and transport them, and to collect the bill, and the order was filled to the letter. Thereby, the offer was accepted, the property in the carpets passed to the defendant, and he became liable for the price, as for goods sold and delivered. The order was an offer, the filling the order was an acceptance; and an offer and acceptance is the common definition of a contract.

The defense is put upon this ground: the defendant's letter to plaintiff was only an offer, there was no contract until the plaintiff accepted it and notified the defendant; and the notice ought to have been by mail, within a reasonable time.

The plaintiff says that he did accept immediately upon receipt of the order, and forwarded the carpets as soon as he could have them made up, which was within a reasonable time—seven days, and that this was all he had to do. The point of divergence between the plaintiff and defendant is, that the defendant says, the plaintiff ought to have notified him by mail that he had accepted the offer, and forwarded the goods; that merely filling the order, although in the exact terms thereof, was not an acceptance, without notice. The propriety of giving notice by mail must depend a good deal upon the circumstances of each particular case, as if the order requires it, or, if the order is not sufficiently specific, and leaves something further to be arranged, or, if considerable time must pass in the manufacture of the article, or, if the route or means of transportation is not known, or the voyage long and dangerous, and the like. But if an offer and acceptance—an unconditional and specific order, and an exact fulfillment, as in this case, does not complete the contract, how would it be possible to complete a contract by mail? A sends an unconditional order to B, and, instead of B's filling the order, he writes back that he accepts the order and will fill it, but in the meantime A may have changed his mind, and lest he has, he must write back to B and so on, forever. *Adams v. Lindsell*, 1 B. & Ald., 681, is the leading English case, illustrating and repudiating this circumlocution; and that case has been followed ever since in England and America, as is said in 1 *Parsons on Contracts*, note, page 483. In that case it was said, speaking of the above rule, "If it were not so, no contract could ever be completed by post. For if the defendant was not bound by his offer, when accepted by the plaintiff, until the answer was received, then the plaintiff ought not to be bound

until after he had received the notification that the defendant had received his answer and assented to it. And so it might go on *ad infinitum*."

We admit that the rule, that filling an order completes the contract, is confined to unconditional and specific orders. And, if the purchaser thinks proper, he can make his order as guarded as he pleases. He may say, "I want such goods; can you furnish them? If so, at what price, and within what time? Inform me by return mail. I will pay if the goods arrive safe,—otherwise not"—and the like. Then he will not be liable unless the terms are strictly complied with.

In the case before us the order was unconditional and specific, and was complied with to the letter. The defendant did not ask the plaintiff to inform him whether he would fill the order. He had no doubt about it. It was the plaintiff's business to fill such orders, and the defendant had confidence in him. So far from requiring the plaintiff to notify him by mail, he impliedly informed him that he need not do so: Send the goods by Express, C. O. D., without more say; and send the bill by express for collection, or, if you are afraid to trust me, then, in that case only, you may write to me and I will send the money, before you ship the goods,—is, substantially, what the defendant said in his order to the plaintiff. There was no use in informing the defendant by mail of the shipment of the goods, because the express is as speedy as the mail; and there is certainly no magic in sending by mail. And sending the goods is the best notification.

The defendant complains also that the plaintiff did not answer his telegram. The answer is, that neither the mail nor the telegraph had been designated as the means of communication, but the express. And it was the defendant's misfortune, if not his fault, to go elsewhere than to the place designated, for information. The plaintiff's duty ended when he delivered the goods to the agent designated by the defendant, the express, with the bill for the price to collect. The goods were at their destination—the express office—when the defendant sent his telegram. He did not go to the express office at all, and offers no explanation why he did not, but left the plaintiff to infer, as he seems to have done, that his purpose was to avoid the contract.

Per Curiam.

Affirmed.

Early in April the defendant directed the plaintiff's agent to ship guano to him at Edward's Ferry. On the 12th of April the plaintiff delivered the guano to the steamboat company at Baltimore, consigned to defendant as directed. The guano failed to reach defendant, and the first notice he had of its having been sent was when the price was demanded in November. He had paid the freight with other freight bills, but received no bill of lading. The defendant was held liable for the price, because "as soon as the order of the defendant was accepted,

the contract was complete without further notice, and it was fully performed on the part of the plaintiff when the guano was delivered to the steamboat company in good condition." *Ober v. Smith*, 78—313. For another view, see dissenting opinion of Rodman, J., in this case and in *Crook v. Cowan*.

Where the offer indicates that the other person shall promise something, communication of acceptance is necessary; but where it indicates that the other shall do some act, doing the act may be an acceptance without further communication. *White v. Corlies*, 46 N. Y., 467; *New v. Ger. Ins. Co.*, 171 Ind., 33, 85 N. E., 703, 131 A. S. R., 245; 6 R. C. L., 607. Mere silence may, under exceptional circumstances, be an acceptance, but generally there must be something said or something done before a contract is established. *Prescott v. Jones*, 69 N. H., 305, 41 Atl., 352; *Royal Ins. Co. v. Beatty*, 119 Penn. St., 6, 12 Atl., 607, 4 A. S. R., 622; retaining goods may be an acceptance, *Miller v. Lumber Co.*, 66—504; *Hobbs v. Massasoit Whip Co.*, 158 Mass., 194, 33 N. E., 495.

Railroad time table as an offer.—In *Coleman v. R. R.*, 138—351, plaintiff sued for damages for loss of time, etc., caused by the train's failing to come on schedule time, and the failure of the agent to inform him, etc. The court says: "The printed schedule is an offer which was accepted by the plaintiff when he asked for a ticket, and he had the legal right to be transported by the first train stopping at H. If the train arrives after schedule time or misses connection, or delivers a passenger at his destination after schedule time, unless the delay is caused by no fault of the carrier, the passenger has a right to recover for loss of time and actual expenses." In accord with this, see *Heirn v. McCaughan*, 32 Miss., 17, 66 A. D., 588, 603, and note; *Sears v. R. R.*, 14 Allen, 433, 92 A. D., 780; *Denton v. Great Northern R. R.*, 34 Eng. L. & Eq., 154. Other cases hold that the time table only holds the company to the exercise of due diligence to comply with it, and the liability is sometimes restricted by a notice that it is only for information and is subject to change. *Gordon v. R. R.*, 52 N. H., 596, 13 A. R., 97; *Purcell v. R. R.*, 108—414; *Hansley v. R. R.*, 117—565, 32 L. R. A., 544; 9 Cyc., 279; 5 A. & E. Enc., 585; *Pollock Cont.*, 16, 17; *Carriers*, Cent. Dig., secs. 1037, 1046; 4 R. C. L., 1069.

3. IT MUST BE IDENTICAL WITH THE OFFER.

(22) *MORRISON v. PARKS*,

164 N. C., 197, 80 S. E., 85—1913.

Action for breach of contract for the sale of lumber. The defendant wrote to the plaintiff, offering 80,000 feet of oak at \$16 per M "log-run," and mill culls at \$8 per M. The plaintiff replied: "We will take your 4/4 oak, at \$16, mill culls out. We will handle all your mill culls, but not at the price you are asking. We are buying from for \$4.50 on board the cars. We would be glad to handle yours at this price." From a judgment of nonsuit, the plaintiff appealed.

CLARK, C. J. . . . The alleged contract being in writing, the construction of this written evidence was a matter for the court. In order to make the offer and reply a contract, "The acceptance must be (a) absolute and unconditional; (b) identical with the terms of the offer; (c) in the mode, at the place, and within the

time expressly or impliedly required by the offer." Clark Cont., 25; Sumrell v. Salt Co., 148 N. C., 552.

The plaintiff Morrison testified that "4/4" means lumber "an inch thick, of any length or width," and that "log-run" means "any thickness, with culls out." He further testified that the market price of 4/4 lumber, of that character, at that place and time, was \$18.50. It is apparent that the reply was not an acceptance of the terms of the offer of the defendant. (1) The defendant offered to take \$8 per M for mill culls. The plaintiff replied, offering \$4.50. (2) The defendant offered 80,000 feet of oak "log-run" at \$16. The plaintiff replied, offering \$16 per M for 4/4 oak, an entirely different article, and which he himself testified was then worth in the market \$18.50 at the same place.

There was no contract. The offer of the defendant was not accepted, but a counter-offer of an entirely different nature was made. The minds of the parties never met. The judgment of nonsuit must be affirmed.

The owner of certain vessels then on the way from New York to North Carolina, proposed to A to guarantee a certain price for corn if he would ship it in these vessels. A did not ship the corn in these vessels, but did send it by other vessels of the same owner a month or two later, and failed to receive the guaranteed price. This was not an acceptance so as to bind the owner on the first proposition. Spruill v. Trader, 50—39. For other cases, see Mizell v. Burnett, 49—240; Gregory v. Bullock, 120—260; Clark v. Lumber Co., 158—139; Hall v. Jones, 164—199; Eliason v. Henshaw, 4 Wheaton, 382; Weaver v. Burr, 31 W. Va., 736, 3 L. R. A., 94; Jordan v. Norton, 4 M. & W., 155, 6 E. R. C., 142; Carr v. Duval, 14 Peters, 77; 6 R. C. L., 608; Contracts, Cent. Dig., secs. 88, 100; Dec. Dig., sec. 16.

(23) PETIT v. WOODLIEF,

115 N. C., 120, 20 S. E., 208—1894.

EVERY, J. The defendant enclosed in a letter a draft to the plaintiff for \$300, setting forth upon its face that it was to operate as a payment in full of a claim for repairing an engine. The defendant contended that only \$250 was in fact due, but stated in his letter that he had concluded to send \$300. The letter and draft construed together constituted a proposal of compromise, and even though in reality a larger sum was due, as the jury found, if the offer was accepted, either expressly or by implication arising from the defendant's conduct, there was not simply a valid executory agreement, but an executed contract, as in that event the payment operated to discharge the whole claim.

The defendant Woodlief not only stated in his letter that the draft for \$300 was enclosed "to settle with you (plaintiff) in full to date," but, according to the undisputed testimony, the same words, or the equivalent expression, "settlement in full to date,"

were incorporated in the draft itself, which was drawn on Strudwick & Royster, and was afterwards destroyed by fire. When the plaintiff endorsed this draft and collected the money, with the proposal staring him in the face that it should, if received, operate to discharge the whole debt, instead of returning it to the drawer and declining the offer, we think that his conduct amounted to an acceptance of it, and the debt was therefore discharged in full. Our statute (The Code, sec. 575), having been declared constitutional, the offer of a part in satisfaction of the whole, if accepted, discharges a debt as fully and effectually as if the entire sum originally due is paid in full. When the amount due is uncertain or unliquidated, if an offer in satisfaction of the claim is accompanied with such acts and declarations as amount to a condition that the money shall be accepted only as a payment in full of the claim, and the party to whom the offer is made must of necessity understand, from its very terms, that if he takes the money he takes it subject to such condition, then, in law, the payment operates to discharge the whole claim. *Preston v. Grant*, 34 Vt., 201; *Townsend v. Healee*, 39 Vt., 522; *Boston Rubber Co. v. Peerless Co.*, 58 Vt., 553. Under the construction placed upon our statute, the offer of a less sum than is due, when the amount of the debt is certain, is in effect the same as the offer of a given sum in satisfaction of a contingent or unliquidated claim. We can not rely as authority, therefore, upon the earlier cases decided by the court, or upon the authorities in other States, where the principle still prevails that an agreement to accept a payment of a part of an unconditional claim for a sum certain in satisfaction of the whole is, unless there is an actual release, but a *nudum pactum*. We must, therefore, be governed by the rule adopted in reference to offers to settle contingent claims, because they are analogous to proposals of compromise of indebtedness under our statute. The plaintiff knew, from the face of the draft, that the defendant intended it to be accepted upon condition that it should discharge the debt, and that the draft itself should be in the nature of a receipt or voucher for the full payment. With that knowledge he chose to use the draft and take his chances to collect more. We think the question of intent was no more an open one for the jury to determine upon the testimony than would be the question of acceptance where the drawee writes the word "Accepted" on the back of a bill of exchange and signs his name under it. There is no difference in principle between the case at bar and that of *Boykin v. Buie*, 107 N. C., 501. There the creditor agreed by letter to accept an offer from the debtor of a part in discharge of his whole debt, but when the latter forwarded a check in compliance with the agreement, entered the amount paid as a credit.

In our case the defendant sent a draft and a letter, both expressing the condition upon which the draft was to be accepted. The terms of the proposition being unmistakable, we think that the acceptance of the money was an implied assent to the proposal, the legal effect of which was to discharge the whole debt.

New trial.

Accord, *King v. Phillips*, 94—555; *Pruden v. R. R.*, 121—509; *Kerr v. Saunders*, 122—635; *Cline v. Rudisill*, 126—523; *Ore Co. v. Powers*, 130—152; *Armstrong v. Lonon*, 149—434; *Drewry v. Davis*, 151—334; *Lumber Co. v. Lumber Co.*, 164—359; *Rosser v. Bynum* (N. C.), 84 S. E., 393; *Fuller v. Kemp*, 138 N. Y., 231, 20 L. R. A., 785.

6. Revocation of offer.

1. IN GENERAL, AN OFFER MAY BE REVOKED AT ANY TIME BEFORE ACCEPTANCE.

(24) PADDOCK v. DAVENPORT,

107 N. C., 710, 12 S. E., 464—1890.

This was a civil action based upon the following writing:

"Know all men by these presents, that for and in consideration of fifty cents per tree, on the stump, I, R. W. Davenport, of Clay County, N. C., have this day given to T. S. Arthur the exclusive privilege for sixty days of buying all of the merchantable poplar and ash, and \$1 for cherry trees; that he, his agents or successors, may select and mark on my tract of 300 acres of land, No. 13 and 2456, in district 18, on the waters of Shooting Creek, Towns and Clay County, Georgia, and North Carolina; the said timber to be paid for when it is marked up. I further give said T. S. Arthur or his successors the right-of-way, free of charge, over my lands by a practicable route to get their timber out, and the use of small timbers to build roads and load timber, and when said timber is paid for, as provided for above, I, R. W. Davenport, herein bind myself, my heirs and lawful assigns, to make said T. S. Arthur or his legal representatives a good and lawful deed to said timber. This October 23, 1889.

"(Signed) R. W. Davenport. (Seal.)"

T. S. Arthur, for a valuable consideration, assigned his interest in the contract to the plaintiff, and the plaintiff, before the sixty days expired, went to the defendant and offered to mark and pay for the trees. The defendant refused to allow him to do so, but sold the timber to a third person with notice.

The plaintiff brought suit for specific performance, to have the purchaser declared a trustee, and for damages for breach of contract. Demurrer by the defendant was sustained, and the plaintiff appealed.

SHEPHERD, J. Two causes of action are set out in the complaint—one for damages for breach of contract, and the other for its specific performance. The court held, upon demurrer, that neither of said causes of action could be maintained.

1. As to the cause of action against the defendant, Davenport, we think there was error in the ruling that the contract for the sale of the trees was void for want of consideration.

The paper-writing sued upon is substantially an offer to sell the trees at a certain price within sixty days. There being no consideration for the offer, it could have been withdrawn at any time within the period mentioned before acceptance by the plaintiff. The offer, however, was not so withdrawn, and the plaintiff having accepted it within the stipulated time, it became a binding contract, for the breach of which the said defendant is answerable in damages. 1 Benjamin on Sales, 50, and the numerous cases cited in the notes.

The offer of the plaintiff to pay the price and mark the trees was sufficient, in our opinion, to constitute a valid acceptance. There was, therefore, error in the ruling as to this cause of action.

See *Cozart v. Herndon*, *supra* (17); *Taylor v. Ins. Co.*, 9 How., 396; *Travis v. Ins. Co.*, 104 Fed., 486; *Lunstrass v. Ins. Co.*, 48 Mo., 201, 8 A. R., 100; *Page Cont.*, sec. 33; *Clark Cont.*, 31; 9 Cyc., 283; 7 A. & E. Enc., 128; 6 R. C. L., 603; *Contracts*, Cent. Dig., sec. 57; *Dec. Dig.*, sec. 19.

It is said that an offer under seal is irrevocable, since it is in the nature of a deed, complete by delivery, requiring only the assent of the other party, and this is presumed until a rejection is shown. *Willard v. Taylor*, 8 Wall., 557; *Xenos v. Wickham*, 6 E. R. C., 422; *O'Brien v. Boland*, 166 Mass., 481, 44 N. E., 602; *Pollock Cont.*, 6; *Clark Cont.*, 32; *Page Cont.*, sec. 35; 9 Cyc., 287. In *Paddock v. Davenport*, *supra*, the writing was under seal, but the court said it could have been revoked at any time before acceptance. See also *Alston v. Connell*, 140—485; *State v. Pool*, 27—105.

2. OPTIONS.

(25) BLALOCK v. CLARK,

133 N. C., 306, 45 S. E., 642—1903.

This was a civil action on contract. From a judgment for the defendant the plaintiff appealed.

CLARK, C. J. This is an action to recover damages for non-delivery of 200 bales of cotton. A witness, one of the plaintiffs, went to see the defendants 7th February. They had 200 bales for sale, which the witness sampled and asked an option upon them, to see if he could place them. The defendants on that day gave him this option, dated 7th February and signed by them: "We

offer you 160 to 200 bales of cotton, grades as you have seen, at eight cents per pound, F. O. B., provided we do not receive better price by mail to-day. This offer closes by 8th February." Later, on that day (7th February), the plaintiffs wired the defendants: "Wire me at Mount Gilead, at once, if my offer is bettered." The next day, 8th February, the witness wired the defendants: "Have written once, wired twice, no reply; we claim cotton on your offer. Shipping instructions will follow." He testified further that on 9th or 10th February, he went to Troy, where the defendants resided, twenty miles through the country, to weigh up, pay for and ship, but did not do so because of rain, cotton not under shelter and wet. As soon as it was dry and the rain and the condition of the river would permit him to get there, he says he went back, on 15th February, and told the defendants he had come "to weigh, pay for and ship cotton;" whereupon they told him they would not let him have it; that cotton had gone up to eight and a half cents and they could not afford to let him have it at eight cents. The witness further says he demanded the cotton and the defendants refused; that he was able and ready to pay; that he did not tender the cash; that he did not have enough cash in hand, but had money in bank and credit in bank, and "could have paid cash that day." That he had resold part of the cotton to others at an advance, and that it was a cash transaction.

Upon this evidence it was error to nonsuit the plaintiff. The option "to close by 8th February," included February 8th, till midnight. "By 8th February" means "not later than February 8th." *Cotton Mills v. Dunston*, 121 N. C., 16, and cases there cited. Besides, by the terms of this option it could operate only on 8th February, for it was given on 7th February, and the defendants reserved the right to accept a higher bid if they received it by mail on that day.

The peremptory refusal of the defendants to deliver the cotton "because the price had gone up" made it unnecessary to make any tender of the actual cash, for on this motion the witness's testimony must be taken as true, that he offered to pay and was ready and able to pay. *Smith v. B. & L. Asso.*, 119 N. C., 260, and cases there cited; *Grandy v. Small*, 50 N. C., 50. Whether there was unreasonable delay in going for the cotton is a matter for the jury, under instructions from the court, and upon which the defendants may wish to offer evidence. The acceptance of the offer was, 8th February, in time. The execution of the contract, the payment and delivery must be in a reasonable time. . . .

Error.

An option is defined to be "the obligation by which one binds himself to sell, and leaves it discretionary with the other party to buy, which is simply a contract by which the owner of property agrees with

another person that he shall have the right to buy the property at a fixed price within a certain time." "If not based on a valuable consideration, the right to buy may be withdrawn at any time before acceptance; but if there is a valuable consideration to support it, the right continues during the period fixed in the option." *Winders v. Kenan*, 161 p. 632, citing *Black v. Maddox*, 104 Ga., 157; *Trogden v. Williams*, 144—199; *Cummins v. Beaver*, 103 Va., 230; *Hardy v. Ward*, 150—393; *Weaver v. Burr*, 31 W. Va., 201. For other cases, see *Davis v. Martin*, 146—281; *Timber Co. v. Wilson*, 151—154; *Clark v. Lumber Co.*, 158—139; *Ward v. Albertson*, 165—218; *Stitt v. Huidekoper*, 17 Wall., 384; *Eskridge v. Glover*, 5 St. & P. (Ala.), 264, 26 A. D., 344; *Litz v. Goosling*, 93 Ky., 185; 21 L. R. A., 127; *Coleman v. Applegarth*, 68 Md., 21, 11 Atl., 284, 6 A. S. R., 417; 6 R. C. L., 604; 9 Cyc., 285; 20 A. & E. Enc., 924; *Contracts*, Cent. Dig., sec. 69; *Dec. Dig.*, sec. 19.

Timber contracts as options.—When the timber on land is sold, to be removed within a certain time, it is in the nature of an option, and the vendee can not remove it after the specified time, nor can he recover the money paid for such right. *Bunch v. Lumber Co.*, 134—116; *Trogden v. Williams*, 144—192; *Lumber Co. v. Smith*, 146—158; *Bateman v. Lumber Co.*, 154—248; *Lumber Co. v. Whitley*, 163—47.

In a lease with an option to purchase.—The lessee has the time specified to exercise his right, the lease being a sufficient consideration, and his failure to exercise the right will discharge the lessor. *Product Co. v. Dunn*, 142—471; *Pearson v. Millard*, 150—303; *Hayes v. O'Brien*, 149 Ill., 403, 37 N. E., 73, 23 L. R. A., 555.

3. BROKER'S CONTRACT.

(26) ABBOTT v. HUNT,

129 N. C., 403, 40 S. E., 119—1901.

CLARK, J. In March, 1899, the defendant, who was the owner of certain real estate in Charlotte, agreed orally with the plaintiffs, who were real estate agents and at that time in charge of said property as his rental agents, that they might sell it if they could secure a price that would net the defendant the sum of \$33,000. The plaintiffs made effort to sell the property, and on April 4 telegraphed defendant an "offer of \$32,000, subject to a commission of 2 percent." This offer the defendant declined by letter, and added: "I prefer you do not offer it again, even at the price named, unless I can sell my residence. Sell the residence, then I will sell the business property." On April 10 the plaintiffs wrote defendant they had sold the property at \$33,000 net, and he declined to ratify their action. His Honor below correctly held that the defendant's letter of April 4 terminated the agency.

An agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party. The only exception is an agency coupled with an interest, and that must be an interest in the subject of the agency, and not merely something collateral, as commissions or compensation for making sale. *Hartley's Appeal*, 53 Pa. St., 212, 91 A. D., 207, which holds that a power of attorney by which the attorney

is to receive as compensation "one-half of the net proceeds" is not a power coupled with an interest, and is revocable. . . .

In *Sibbald v. Iron Co.*, 83 N. Y., 378, 22 A. R., 441, the Court of Appeals of New York reviews the cases and states the law thus: "It follows as a necessary deduction from the established rule, that a broker is never entitled to a commission for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which were staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions, which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seed from which others reap the harvest; but all that gives him no claim. It was part of his risk that, failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors."

In *Atkinson v. Pack*, 114 N. C., 597, and *Martin v. Holley*, 104 N. C., 36, the broker had procured a purchaser at the stipulated price before the revocation of the power, and, of course, being an executed contract, the agent was entitled to his commission, and the same might be true where the revocation was in bad faith, just as the contract was about being consummated, the revocation being for the purpose of depriving the agent of his commissions. But such is not the case here. There is no evidence to show it.

No error.

When a broker, authorized to sell, has commenced negotiations, the owner can not take it into his own hands and complete the sale, and then refuse to pay the commissions. When the broker has procured a purchaser before the authority is withdrawn, or the contract fails because of defects in the owner's title, he is entitled to commissions. *Martin v. Holley*, 104—36; *Mallonee v. Young*, 119—549; *Satterthwaite v. Goodyear*, 137—302; *Trust Co. v. Adams*, 145—161; *Clark v. Lumber Co.*, 158—139; *Trust Co. v. Goode*, 164—19; 167—338; *Stensgaard v. Smith*, 43 Minn., 11, 19 A. S. R., 205; *Cloe v. Rogers*, 121 Pac., 201, 38 L. R. A. (N. S.), 366; *Alexander v. Sherwood*, 72 W. Va., 195, 77 S. E., 1027, 49 L. R. A. (N. S.), 985; *Hartford v. McGillicuddy*, 103 Me., 224, 68 Atl., 860, 12 Ann. Cas., 1083; 4 R. C. L., 252.

4. REVOCATION MUST BE COMMUNICATED.

WHEAT v. CROSS,

Ante (19).

The revocation of an offer must be communicated, if express revocation is required, and this may be either directly in the way in which the offer was made, or by any notice to the offeree before acceptance. Clark on Cont., 33; 1 Page Cont., sec. 36; 9 Cyc., 288, 289, and notes, discussing Cook v. Oxley, 3 T. R., 653; Stevenson v. Mclean, 6 E. R. C., 82; Pollock Cont., 30, 32. Whether an acceptance once mailed can be afterwards revoked by notice to the other party before he receives the acceptance, is not clearly settled. A strict application of the rule would make such acceptance irrevocable. Stevenson v. McLean, 6 E. R. C., 82; Household Ins. Co. v. Grant, 6 E. R. C., 115; Satterthwaite v. Goodyear, 137, p. 304.

5. REVOCATION BY LAPSE OF TIME.

BANK v. MILLER,

Ante (20).

See also Mizell v. Burnett, 49—249; 1 Page Cont., secs. 38, 39; Clark Cont., 36; 9 Cyc., 291; 7 Am. & Eng. Encyc., 133; Atlee v. Bartholomew, 69 Wis., 43, 5 A. S. R., 103.

6. REVOCATION BY REJECTION OR CONDITIONAL ACCEPTANCE.

COZART v. HERNDON,

Ante (17).

See also Gregory v. Bullock, 120—260; Spruill v. Trader, 50—39; Egger v. Nesbitt, 122 Mo., 667, 43 A. S. R., 596; Hyde v. Wrench, 3 Beav., 334, 6 E. R. C., 139; Jordan v. Norton, 6 E. R. C., 141; 6 R. C. L., 608; Page Cont., sec. 37; Clark Cont., 36; 9 Cyc., 290; 7 A. & E. Enc., 128; Contracts, Cent. Dig., secs. 96-103; Dec. Dig., secs. 21, 23.

7. REVOCATION BY DEATH OR INSANITY.

(27) PRATT v. TRUSTEES,

93 Ill., 475, 34 A. R., 187—1879.

This was an action by the trustees of the Baptist Society against Mary L. Pratt, admrx., upon two promissory notes executed by her intestate to said trustees, to enable them to buy a bell for the church. Nothing was done with the notes, and no expense was incurred about the bell until after the death of the intestate. Judgment for the plaintiff. Reversed.

SCHOLFIELD, J. In the absence of anyone claiming as a bona fide assignee before maturity, it is not perceived that prom-

issory notes, executed as these were, are, in any material respect, different from an ordinary subscription whereby the subscriber agrees under his hand, to pay so much in aid of a church, school, etc., where there is no corresponding undertaking by the payee. The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon. It is the expending of money, etc., or incurring of legal liability, on the faith of the promise, which gives the right of action, and without this there is no right of action. *McClure v. Wilson*, 43 Ill., 356; *Trustees v. Garvey*, 53 Ill., 401, 5 A. R., 51; *Bapt. Ed. Soc. v. Carter*, 72 Ill., 247.

Being but an offer, and susceptible of revocation at any time before being acted upon, it must follow that the death of the promisor, before the offer is acted upon, is a revocation of the offer. This is clearly so upon principle. The subscription or note is held to be a mere offer, until acted upon, because until then there is no mutuality. The continuance of an offer is in the nature of its constant repetition, which necessarily requires someone capable of making a repetition. Obviously this can no more be done by a dead man than a contract can, in the first instance, be made by a dead man. . . .

An analogous case is *Mich. St. Bank v. Leavenworth*, 2 Williams (Vt.), 209, where it was held that the operation of a letter of credit was confined to the life of the writer, and that no recovery can be had upon it for goods sold or advances made after his death. The question has been raised, in some cases, whether a party acting in good faith upon the belief that the principal is alive, may recover, does not arise here, as there is nothing in the evidence to authorize the inference that the bell here was purchased under the belief that Pratt was still alive.

Judgment reversed.

If the contract was in progress of execution, and there remained a single act to be done to complete it, the death of one of the parties before that act was done would prevent the making of the contract. *Mactier v. Frith*, 6 Wend., 103, 21 A. D., 262; if the contract is by correspondence, the mailing of the acceptance completes it, and the death of either party after such mailing would not affect it. *Ibid.*; *N. W. Mut. L. Ins. Co. v. Joseph*, 31 Ky., 714, 103 S. W., 317, 12 L. R. A., (N. S.), 439. If the party who makes the offer dies or becomes insane before it is received and accepted, the offer is then a nullity, though accepted before the death is known. *The Palo Alto*, Fed. Cas., 10,700; see also *Phipps v. Jones*, 20 Pa. St., 260, 59 A. D., 708; *Wallace v. Townsend*, 43 Ohio St., 537, 54 A. R. 829; *Contracts*, Cent. Dig., sec. 58; *Clark Cont.*, 37; *Page Cont.*, sec. 40; 9 Cyc., 293; 7 A. & E. Enc., 136; 6 R. C. L., 613.

7. Offers to the public.

1. REWARDS.

(28) BROADNAX v. LEDBETTER,

100 Tex., 375, 99 S. W., 1111, 9 L. R. A. (N. S.), 1057—1907.

This was an action to recover a reward, and presented the following question: Was notice or knowledge to plaintiff of the existence of the reward when the recapture was made essential to his right to recover?

WILLIAMS, J. . . . Upon the question stated, there is a conflict of authorities in other States. All that have been cited or found by us have received due consideration, and our conclusion is that those holding the affirmative are correct. The liability for a reward of this kind must be created, if at all, by contract. There is no rule of law which imposes it except that which enforces contracts voluntarily entered into. A mere offer or promise to pay does not give rise to a contract. That requires the assent or meeting of two minds, and therefore is not complete until the offer is accepted. Such an offer as that alleged may be accepted by anyone who performs the service called for when the acceptor knows that it has been made and acts in performance of it, but not otherwise. He may do such things as are specified in the offer, but in so doing, does not act in performance of it, and therefore does not accept it, when he is ignorant of its having been made. There is no such mutual agreement of minds as is essential to a contract. The offer is made to anyone who will accept it by performing the specified acts, and it only becomes binding when another mind has embraced and accepted it. The mere doing of the specified things without reference to the offer is not the consideration for which it calls. This is the theory of the authorities which we regard as sound. Pollock Cont., 20; Anson, Cont., 41; Wharton, Cont., secs. 24, 507; Story, Cont., 493; Page, Cont., sec. 32; 9 Cyc., 254; 29 A. & E. Enc., 956. The decisions of the courts upon the question are cited by the authors referred to.

Some of the authorities taking the opposite view seem to think that the principles of contracts do not control the question, and in one of them, at least, it is said that "the sum offered is but a boon, gratuity, or bounty, generally offered in a spirit of liberality, and not as mere price, or a just equivalent simply for the favor or service requested, to be agreed or assented to by the person afterward performing it, but, when performed by him, as justly and legally entitling him to a fulfillment of the promise, without

any regard whatever to the motive or inducement which prompted him to perform it." *Eagle v. Smith*, 4 Houst. (Del.), 293. But the law does not force persons to bestow boons, gratuities, or bounties merely because they have promised to do so. They must be legally bound before that can be done. It may be true that the motive of the performer in rendering service is not of controlling effect, as is said in some of the authorities above cited in pointing out the misapprehension of the case of *Williams v. Carwardine*, 4 B. & Ad., 621, 6 E. R. C., 133, into which some of the courts have fallen; but this does not reach the question whether or not a contractual obligation is essential.

Other authorities say that it is immaterial to the offerer that the person doing that which the offer calls for did not know of its existence; that the services are as valuable to him when rendered without, as when rendered with, knowledge. *Dawkins v. Sappington*, 26 Ind., 199; *Auditor v. Ballard*, 9 Bush., 572, 15 A. R., 728. But the value to the offerer of the acts done by the other party is not the test. . . . He is responsible, if at all, because by his promise he has induced the other to do the specified things. . . . Without the legal obligation thus arising from contract, there is nothing which the law enforces.

Reasons have also been put forward of a supposed public policy, assuming that persons will be stimulated by the enforcement of offers of rewards in such cases to aid in the detection of crime and the arrest and punishment of criminals. . . . Courts can enforce only liabilities which have in some way been fixed by law. While we have seen no such distinction suggested, it may well be supposed that a person might become legally entitled to a reward for arresting a criminal, although he knew nothing of its having been offered, where it is or was offered in accordance with law by the government. A legal right might in such a case be given by law without the aid of contract. But the liability of the individual citizen must arise from a contract binding him to pay. The question is answered in the affirmative.

For further discussion, see *Comrs. v. Davis*, 162 Ind., 60, 1 Ann. Cas., 282, and note; *Smith v. Vernon Co.*, 188 Mo., 501, 70 L. R. A., 59; the service must be performed by the claimant, *Currie v. Swindall*, 33—331; *McGraughry v. King*, 147 Fed., 463, 7 L. R. A. (N. S.), 216, 8 Ann. Cas., 856. It is not necessary to give notice of the acceptance, since performance is acceptance. *Rief v. Paige*, 55 Wis., 496, 42 A. R., 731.

A person acting as an officer in making the arrest can not claim the reward. *Malpass v. The Governor*, 70—130; *Hayden v. Songer*, 56 Ind., 42, 26 A. R., 1; *Bank v. Edmund* 76 Ohio St., 396, 81 N. E. 641, 11 L. R. A. (N. S.), 1170, 10 Ann. Cas., 726; 7 A. & E. Enc., 136; 24 *Ibid.*, 941; 9 Cyc., 225; 34 Cyc., 1730; *Rewards*, Cent. Dig., secs. 4-14; Dec. Dig., secs. 7, 11. In N. C., by the Acts of 1913, ch. 132, an officer is entitled to the reward, if the crime for which the arrest was made was not committed within his county.

Offers of reward, like other offers, may be revoked before acceptance, and such revocation may be in the same way in which the offer was made, or by lapse of time. *Mitchell v. Abbott*, 86 Me., 338, 29 Atl., 1118, 41 A. S. R., 559, 25 L. R. A., 503; *Shuey v. U. S.*, 92 U. S., 73.

2. AUCTIONS.

(29) *TILLMAN v. DUNMAN*,

114 Ga., 406, 40 S. E., 244, 88 A. S. R., 28, 57 L. R. A., 784—1901.

The plaintiff claimed certain land under an auction sale by the defendant, in which the plaintiff had the highest bid, but the defendant refused to accept it and withdrew the land from sale.

LITTLE, J. . . . The questions to be determined in this case are, whether an executor has the right to withdraw property from sale, after it has been duly advertised and offered for sale at public outcry by an auctioneer employed by the executor, and bids are received and cried, before the same is knocked off to the highest bidder; and whether the highest bidder in such a case acquires any right, by reason of his bid, to compel the executor to accept the same and make him a deed upon tender of the amount so bid. As a decision of these two questions is controlled by the same principle of law, they will be considered together. It is well-recognized law that a bidder at an auction sale may withdraw his bid even after it has been cried, at any time before the hammer falls or the property is knocked off to him. *Payne v. Cave*, 3 T. R., 148; 3 A. & E. Enc., 501, and cases there cited. In *Payne v. Cave*, the principle underlying this rule is thus stated: "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract; that is signified on the part of the seller by knocking down the hammer. . . . Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to." For the same reason the seller has the right to withdraw the property before it is knocked off to the bidder. Mr. Story, in his treatise on the Law of Sales, sec. 461, states the rule thus: "In a sale by auction the seller may withdraw the goods, or the bidder may retract his bid, at any time before they are knocked off; for so long as the final consent of both parties is not signified by the blow of the hammer, there are only mutual propositions, but no mutual agreement to one definite proposition." Kent. Com., 537; *Carryolles v. Mossy*, 2 La., 504. But it is claimed that this rule of auction sales does not apply to sales by administrators and executors, as they are regulated by statute, which must be strictly complied with. . . . There is a close resemblance between an executor's or administrator's sale, when made under an order of court, to one made under an execution

or decree, or other compulsory process. . . . But granting, for the sake of argument, that the sale in question rested upon the same footing with judicial sales, we find that it has been determined that an officer of court has a right to withdraw property, even when offered for sale under compulsory process, and bids have been received and cried; and that the bidder at such a sale acquires no right to compel the officer to convey the property, even where his bid is the best and highest, unless the property is knocked off to him or the hammer falls, and the sale is thus completed. [Citing *Freeman on Executions*, sec. 288, p. 1665; *Miller v. Law*, 10 Rich. Eq., 320, 73 A. D., 92; *Blossom v. R. R. Co.*, 3 Wall., 196; *Scales v. Chambers*, 113 Ga., 920, 39 S. E., 396.] . . . It would, therefore, seem that even if the rule governing judicial sales is to be applied to the sale by the executors in the present case, they had the right to withdraw the property from sale; and that Tillman, by reason of being the highest and best bidder at such sale, acquired no right to compel a conveyance by the executors, as the property was withdrawn before the same was knocked off to him by the auctioneer, for the reason that there was no acceptance of his offer, and no contract. . . .

See *Anderson v. Wis. Cent. R. R.*, 107 Minn., 296, 120 N. W., 39, 20 L. R. A. (N. S.), 1133; 131 A. S. R., 462, 16 Ann. Cas., 379; 4 Cyc., 1044; 1 *Parsons Cont.*, 517; 2 *R. C. L.*, 1122; *Auctions*, Cent. Dig., secs. 20, 24; Dec. Dig., sec. 7.

A having the hiring of certain slaves, appointed B as auctioneer to make such hiring publicly to the highest bidder. A did not intend to accept any bid from C, because of his character as a master, but failed to notify B. C became the highest bidder, and upon his complying with the terms of hiring the contract was complete. *Ricks v. Battle*, 29—269.

The auctioneer is an agent with sufficient power to bind the parties under the Statute of Frauds. *Proctor v. Finley*, 119—536. But in a sale under order of court, the bid is only an offer to buy, and confers no rights until accepted and sanctioned by the court. *Mebane v. Mebane*, 80—34; *Dula v. Seagle*, 98—458. If the bidder fails to comply with his bid, and there is another sale, he is not released, but may be held for the difference in price and the expense. *Petillo, ex parte*, 80—50; *Love v. Harris*, 156—88.

Sec. 5. The agreement must be intended to affect legal relations.

1. Gratuitous service.

(30) EVERITT v. WALKER,

109 N. C., 129, 13 S. E., 860—1891.

This was a civil action to recover for services rendered under the following circumstances alleged in the complaint: The plaintiff is the sister of Mary C. Walker, who died in 1880, leaving a

child of tender years. The father, C. C. Walker, was insane. On her deathbed Mary C. Walker requested the plaintiff to care for and support the child; plaintiff told her that she would do so, and she has supported the child since the mother's death. She tried to get other relatives to help, but failed, and but for her assistance the child would have become a county charge. Afterwards the father, C. C. Walker, became in some way entitled to property worth about \$6,000, and a Trust Company was appointed his guardian and took charge of the property. The plaintiff sues the father and the Trust Company for about \$1,300 for taking care of the child.

The defendants demurred to the complaint, on the ground that it did not state a cause of action: 1. Because it appears that there was no contract, express or implied, on the part of defendant. 2. Because it appears that plaintiff took care of the child out of pure benevolence.

The demurrer was overruled, and the defendants appealed.

MERRIMON, C. J. We think the court should have sustained the demurrer, upon the general ground that the complaint fails to state facts sufficient to constitute a cause of action. It is not alleged that defendant, Walker, employed the plaintiff to do the service for his child for which she claims compensation, or that he promised expressly, or by implication, to pay her for the same; nor are facts alleged upon which the law implies this liability and obligation to pay therefor. It is not alleged that the father abandoned or neglected his child; that he would not, or could not, protect and provide for and support her; or that he knew of, recognized, approved of and accepted the services of the plaintiff; that he was so in default, or promised to pay for the plaintiff's services, is left to mere inference and remote implication. If it be granted that a father is legally bound to provide for, protect and support his child, it must be alleged, in a case like this, that he failed to do so, or that he promised expressly, or by clear implication, to pay for the services for which compensation is demanded. The facts stated in the fourth paragraph of complaint are too indefinite, indirect and inconclusive to constitute or be treated as a substitute for a material part of the allegation of a cause of action. (This refers to the allegation that she could not get help, etc.) Moreover, it appears from the complaint that at the time the services were rendered, the father was insane and an inmate of the insane asylum, and, at least, *prima facie*, incapable of promising to pay the plaintiff for her services.

Besides, it appears from the complaint that the plaintiff cared for and supported the child of her sister at the latter's request, made shortly before she died, as a work of benevolence and char-

ity, for which she made no charge and expected no pecuniary compensation. She promised her sister not simply to care for, but to care for and support her child; she said nothing of compensation at the time she made the promise, or at any time afterwards, until she brought this action, so far as appears. She does not allege or intimate that she charged the father for her services, or that she expected compensation from him. It seems that, at first, the father was poor and insane; that afterwards, in some way, he came to have property, and the plaintiff then, and not until then, determined to ask for the compensation she seeks to recover by this action. This she can not do. She could not support the child from motives of charity and love for her departed sister without any intention of charging the father for the same, and afterwards, when he came to be the owner of property, compel him to pay her for her good work of love and charity. She had, in such case, no valid claim at law or in equity. *Univ. v. McNair*, 37 N. C., 605; *Hedrick v. Wagoner*, 53 N. C., 360; *Miller v. Lash*, 85 N. C., 54; *Young v. Herman*, 97 N. C., 280.

There is error. The order overruling the demurrer must be reversed, and the case disposed of according to law. To that end let this opinion be certified, etc.

EVERY, J., dissented.

If the agreement refers only to social relations, it is no contract. *Clark Cont.*, 40; 1 *Page Cont.*, sec. 24; 9 *Cyc.*, 273.

2. Pretended consent.

(31) DEVRIES v. HAYWOOD,

64 N. C., 83—1870.

This was an attachment levied on goods, and an interplea by the defendant.

The plaintiff levied on certain goods as the property of one Phillips, and the defendant claimed the goods by virtue of a bill of sale from Phillips. The plaintiff resisted the right of the defendant to interplead, on two grounds: 1. That the bill of sale was fraudulent. 2. If not fraudulent, that Haywood had parted with his title to one Jernigan, before the levy. Haywood denied that there was any sale to Jernigan, but alleged that it was only a sham to keep the sheriff from seizing the goods. There was a verdict and judgment for the defendant, and plaintiff appealed.

READE, J. It is not controverted that the goods levied on as the property of the debtor, Phillips, were his property a short time before the levy; nor is it controverted that, before the levy, Phillips had sold the goods to the party interpleading, Haywood; nor

that Haywood had the right to interplead, provided the property in the goods remained in him. But the plaintiff alleges that Haywood had sold the goods to one Jernigan, and thereby lost his right to be heard. If this were the state of facts, the present is a fruitless controversy; for whoever succeeds, the property will remain Jernigan's, and the costs are the only matter of interest. The question is, did Haywood sell to Jernigan? and in this issue the burden of proof is on the plaintiff.

The plaintiff offered evidence tending to show a sale from Haywood to Jernigan, *i. e.*, that Haywood said he had sold them, and Jernigan said he had bought them; and there was evidence tending to show a delivery. Haywood offered evidence tending to show that there was no sale, and that whatever was said or done which had the appearance of a sale, was a mere contrivance between himself and Jernigan to "save the goods," and to keep the sheriff from seizing his goods as the property of Phillips. Under this conflicting evidence, His Honor left it with the jury to say what was the true character of the transaction between Haywood and Jernigan; explaining to them that if the parties intended a sale, it was a sale, and passed the title to Jernigan; but if it was only a sham or contrivance to deceive the sheriff, and prevent him from taking Haywood's property for Phillips's debt, it could not be a sale. We think that instruction was right.

The plaintiff then asked for special instructions to the effect that if the testimony of the plaintiff's witnesses was believed, there was a sale from Haywood to Jernigan, without regard to the *intention* of the parties. His Honor gave the instructions with the qualification, that the facts were sufficient in *form* to constitute a sale, if it was the *intention* of the parties that they should; otherwise, there was no sale. The question intended to be presented is, whether, when the words and acts of the parties are sufficient in form to make a contract, if so intended, the intention can be shown to be *variant from the ordinary meaning of the words and acts*. A contract is the agreement of two minds; the understanding and intention of the parties are the very gist of the matter. What was the agreement, the understanding, the intention, is always a question for the jury—whilst the legal effect of the agreement is a question for the court. In other words, the terms must be agreed upon by the parties or found by the jury, and then they are to be construed by the court. In our case the terms were not agreed upon; (indeed, it was not agreed that there was *any* contract at all); and therefore it was properly left to the jury. This would be true even if Jernigan were attempting to set up the contract. But he is not. The plaintiff is in the predicament of try-

ing to set up a contract between other parties, when both parties deny that there was any contract between them.

It was also contended by the plaintiff, that inasmuch as Haywood had told the sheriff that he had sold the goods to Jernigan, and had deceived the sheriff, he was now estopped to deny it. It may be that if Haywood had told the sheriff that the goods were the property of Phillips, and the sheriff had been deceived thereby, and levied on them as the property of Phillips, Haywood would have been estopped to deny the title of Phillips, to the injury of the sheriff or the plaintiff, whom he had deceived. But the sheriff was pursuing the goods as the property of Phillips, and was not prevented or deceived by Haywood in that regard; and the fact that he told a falsehood, if he did, in regard to his transaction with Jernigan, in no way affected the sheriff or the plaintiff. *Wallis v. Truesdell*, 6 Pick., 455.

Again, it was insisted by the plaintiff, that Haywood could not claim the property, because, according to his own showing, the transaction between him and Jernigan was a sham, a fraud, and that the maxim applies, *ex turpi causa non oritur actio*.

The answer is that Haywood claims nothing under that transaction, but claims against it, whatever it was, and under his purchase from the debtor, Phillips, which was found to be fair.

Again, it was contended by the plaintiff, that the effect of the fraudulent transaction between Haywood and Jernigan was to pass the title to Jernigan as against Haywood, whatever might have been its effect as to others. Waiving whatever objection there may be to the right of the plaintiff to avail himself of a transaction like the one in question, in which he has no interest, when neither of the parties seeks to set it up, the answer is that the jury have found that there was *no transaction*, fraudulent or other, by which the parties intended to pass the title out of Haywood to Jernigan. If so, of course, there was no sale, as there can be no contract against the intention of the parties. The admission of evidence to show title, does not contravene the rule that words and acts, nothing else appearing, are to be understood in their ordinary acceptance, or the rule that when the terms are ascertained, the legal effect is a question for the court.

There is no error.

Judgment affirmed.

If the whole transaction was in the nature of a joke or banter, no contract exists. *Keller v. Holderman*, 11 Mich., 248, 83 A. D., 737; *Theiss v. Weiss*, 166 Pa. St., 9, 31 Atl., 63, 45 A. S. R., 638; *McClurg v. Terry*, 21 N. J. Eq., 225; *Lutz v. Yount*, 61—367; 9 Cyc., 276; Page Cont., sec. 24.

Sec. 6. The agreement must be complete.

1. Invitation to deal.

(32) CHEROKEE TANNING CO. v. TELEGRAPH CO.,

143 N. C., 376, 55 S. E., 777, 118 A. S. R., 806—1906.

This was a civil action for damages alleged to have been sustained by the plaintiff through negligence of the defendant in failing to transmit and deliver promptly a certain telegram. From a judgment for the plaintiff, the defendant appealed.

BROWN, J. There is no dispute as to the material facts. The evidence shows that on November 7, 1903, an agent of the Standard Oil Company at Wilmington, N. C., wrote to the plaintiff, at Andrews, N. C., a letter containing, among other things, this request: "Kindly advise us by wire Monday if you can use about 1,500 creosote barrels between now and January 1st, at 95 cents each, delivered in car-load lots." That the plaintiff received this letter on Monday, November 9, and at 7:30 p. m. of that day filed with the defendant, at its Andrews office, a message addressed to the Standard Oil Company, Wilmington, N. C., and reading as follows: "We accept your offer 1,500 barrels as per yours of the 7th." This message was delivered to the sendee at 10:36 a. m., November 10. At the same time it wrote to plaintiff, the Oil Company addressed a similar letter to the Brevard Tanning Company and others. The latter company purchased the barrels by telegram received by the Oil Company shortly before plaintiff's message. The plaintiff claims substantial damages. Defendant requested the court to charge that plaintiff was entitled to recover nominal damages only, to wit, the price paid for the telegram. We think this instruction should have been given.

Damages are measured in matters of contract not only by the well-known rule laid down in *Hadley v. Baxendale*, 9 Exch., 341, but they must not be the remote, but the proximate consequence of a breach of contract, and must not be speculative or contingent. Unless the reply of plaintiff by wire to the letter of the Oil Company created a contract between the two for the sale and delivery of 1,500 barrels at 95 cents each, the plaintiff can recover only nominal damages, for any other damages would be necessarily purely speculative or contingent. The language of *Brannon, J.*, in a similar case in West Virginia is appropriate to this: "But the trouble facing the plaintiff in this case is that there was no final contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegraph company did not

cause the breach of a consummate contract; it only prevented one that might or might not have been made." *Beatty v. Telegraph Co.*, 44 S. E. Rep., 309. See also *Hosiery Co. v. Telegraph Co.*, 51 S. E. R., 290, and *Wilson v. Telegraph Co.*, 52 S. E. R., 153. The offer must be distinct as such and not merely an invitation to enter into negotiations upon a certain basis. *Wire Works v. Sorrell*, 142 Mass., 442; *Beaupre v. Telegraph Co.*, 21 Minn., 155; 24 Am. & Eng. Encyc., 1029, and cases cited.

Again, the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract. *McCaw Mfg. Co. v. Felder*, 115 Ga., 408; 24 Am. & Eng. Encyc., 1030, note 1, and cases cited. "The offer must be one which is intended of itself to create legal relations on acceptance. It must not be an offer merely to open negotiations which will ultimately result in a contract." 1 Page on Cont., sec. 26, and cases cited; Clark on Cont., sec. 26.

In *Moulton v. Kershaw*, 59 Wis., 316, the defendants wrote to the plaintiffs as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full car-load lots of 80 to 75 barrels, delivered at your city at 85 cents per barrel to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order." The plaintiff at once telegraphed the defendant: "Your letter of yesterday received and noted. You may ship me two thousand barrels Michigan fine salt as offered in your letter." The defendant declined to deliver the salt, and plaintiff sued for damages. The Supreme Court of Wisconsin, sustaining a demurrer to the complaint, held that the communications between the parties did not show a contract; that the letter of the defendant was not such an offer as plaintiff could by an acceptance change into a binding agreement. See also *Smith v. Gowdy*, 90 Mass., 566.

The letter from the Oil Company to the plaintiff was a mere inquiry. *Walser v. Telegraph Co.*, 114 N. C., 440. It was evidently a "trade inquiry" sent out by the Oil Company to customers, and did not purport and was not intended to be a legal offer binding on acceptance. "Care should be taken always not to construe as an agreement letters which the parties intended only as preliminary negotiations." *Lyman v. Robinson*, 14 Allen (Mass.), 254.

Again, the acceptance by the plaintiff was not in the terms of the offer. The acceptance was for 1,500 barrels. The Oil Company could not have compelled plaintiff to take a less number. If the plaintiff regarded the Oil Company's letter as a valid offer, it should have replied that it would take what barrels the Oil Com-

pany had, not exceeding 1,500, as that company had offered no exact specific number. "The acceptance to bind the other party, must be unconditional and unqualified and must correspond exactly to the terms of the offer." 24 Am. & Eng. Encyc., 1031, 1032, and cases cited; 1 Parsons Cont., 476, 477. As the plaintiff's message to the Oil Company seasonably delivered would not of itself have effected a legal contract between the plaintiff and the Oil Company for the delivery of 1,500 barrels at 95 cents each, it follows that any other than nominal damages would be purely speculative. The Oil Company might have delivered the barrels, and then again it might not have done so. It might have delivered 1,500, and again it might have delivered a much less number. Its letter specified no exact number, and it was under no legal compulsion to deliver any.

As the defendant manifests its willingness to pay nominal damages, it is unnecessary to consider the exceptions to His Honor's rulings on the issue of negligence. We award a new trial upon the second issue relating to the damages.

Partial new trial.

What may constitute an offer which by acceptance may be converted into a contract, and not a mere preliminary step, notice or invitation, is not easily determined, and must depend upon the particular circumstances of each case. Cedar Rapids Lumber Co. v. Fisher, 129 Iowa, 332, 105 N. W., 595, 4 L. R. A. (N. S.), 177; 6 R. C. L., 601; Pollock Cont., 15, 16; 9 Cyc., 278; 7 A. & E. Enc., 138.

Public contracts to the lowest bidder.—In such cases, the right to reject all bids is usually reserved; but when this is not done, the fact that one has made the lowest bid does not entitle him to the contract, in the absence of statutory requirements or other circumstances showing a complete contract. Sanderlin v. Luken, 152—738; Hardison v. Reel, 154—273; Printing Co. v. Hoey, 124—767; Anderson v. Bd. of Pub. Schools, 122 Mo., 61, 27 S. W., 610, 26 L. R. A., 707; Erving v. New York, 131 N. Y., 133, 29 N. E., 1101; Dillingham v. Spartanburg, 75 S. C., 549, 56 S. E., 381, 9 Ann. Cas., 829; Butler v. Darst, 68 W. Va., 493, 70 S. E., 119, 38 L. R. A. (N. S.), 653; 28 Cyc., 661, 1030; 20 A. & E. Enc., 1169; 6 R. C. L., 601; Contracts, Cent. Dig., secs. 112-118; Dec. Dig., sec. 17.

2. Incomplete negotiations.

(33) EDMONDSON v. FORT,

75 N. C., 404—1876.

This was a civil action for the recovery of the price of a steam sawmill which was destroyed by fire. The facts appear in the opinion. Judgment was rendered for the plaintiff, and the defendant appealed.

Reversed.

PEARSON, C. J. . . . The jury find that "the steam sawmill" was not "sold and delivered" by the plaintiffs to defendant; in other words, there was no executed contract and no delivery, either ac-

tual or constructive, by which the ownership of the mill passed to the defendant. But they find that there was a contract by the plaintiffs to sell the mill to the defendant at the price of \$779.42, and a *time and place for completing* said contract was designated by the parties.

The case turns upon the construction of this finding. Does it mean the parties came to a positive and definite agreement, and "the bargain was struck," which, we are told by Blackstone, was in old time signified by shaking hands, a deed or solemn act about which there could be no mistake, which relieved the matter from all doubt, so that a time and place was designated for the mere purpose of carrying the bargain into effect; or does it mean by the words, "completing the contract," the parties chaffered about the sale of the mill for \$779.42, in other words, talked about making a trade and fixed a time and place for meeting in order to complete, that is, close the trade?

If the former was the meaning, then the apt and proper finding would have been, the parties designated a time and place for meeting in order *to execute the contract*, and His Honor would have had the verdict so expressed, but the finding is, a time and place was designated for the parties to meet and *complete the contract*, that is, to close the trade and agree upon what was then left open in order to fix the terms of the contract. If the latter is the true construction—and we think it is—then both of the parties had *locus penitentiae* until the day fixed upon, and might elect either to close the trade or abandon it.

In this view of the matter, it is clear that had the defendant attended at the time and place designated and announced his election not to close the trade—that is, not to complete the contract—the plaintiffs would have had no cause of action and no cause to complain, except that defendant ought to have saved them the trouble of coming to the place designated by giving them notice beforehand of his election not to complete the contract.

The fact that defendant did not attend at the time and place designated was just as distinct notice of his election to abandon the incomplete contract as if he had kept his appointment and made such announcement, and only exposed him to the charge of not being a man of his word and a want of punctuality; but it was no breach of contract, for, as we have seen, the contemplated contract had not been completed and the ownership of the property was still in the plaintiffs, and the risk of loss by fire or otherwise was on them.

In *Willard v. Perkins*, 44 N. C., 253, "the bargain was struck," the contract was completed. "The price was paid down," and the loss is put on the vendee because he was in default in not taking

away the rosin in the time agreed on, which distinguishes it from *Waldo v. Belcher*, 33 N. C., 609, where the purchaser of the corn was in no default for not taking it away before it was burnt.

In the view we have taken of the case, there is error. . . .

LUTZ v. THOMPSON,

87 N. C., 334, *post* (215).

Defendant gave plaintiff's agent an order for goods, signed by one partner but not to be valid unless approved by the other partner; the other partner did not approve it; and the plaintiff was notified not to ship the goods; the contract was incomplete and the plaintiff could not recover for the goods shipped. *Pratt v. Chaffin*, 136—350; *Dunlap v. Willett*, 153—317; *Bowser v. Tarry*, 156—35; *Mercantile Co. v. Parker*, 163—274; *Naested v. Scott*, 20—524; *Devane v. Fewall*, 24—36; *Blewitt v. Boorum*, 142 N. Y., 357, 37 N. E., 119, 40 A. S. R., 600.

In an application for an insurance policy was this clause: "No insurance shall be in force until the delivery of the policy to and the payment of the first premium by the party whose life is insured in good health"; the contract was incomplete until delivery and payment. *Ray v. Ins. Co.*, 126—166. An insurance agent agreed to insure the life of the intestate for a premium of \$50; the intestate paid \$45, but no application was filled or policy issued; the contract was incomplete. *Barnes v. Ins. Co.*, 74—22; *Whitley v. Ins. Co.*, 71—480; *Ormond v. Ins. Co.*, 96—158; *Ross v. Ins. Co.*, 124—395; *Ray v. Ins. Co.*, 126—166; *Perry v. Ins. Co.*, 150—143; *Manfg. Co. v. Assurance Co.*, 161—88.

(34) RANKIN v. MITCHEM,

141 N. C., 277, 53 S. E., 854—1906.

Action for damages for an alleged breach of contract by the defendant in the purchase of 100 bales of cotton. The defendant contended, among other things, that the contract was not complete, in that it was to have been put in writing and signed by the parties, and that was not done. Judgment for plaintiff, and defendant appealed.

Affirmed.

BROWN, J. . . . The evidence for the plaintiffs is clear that a parol contract was entered into by the plaintiffs on the one part and the defendant on the other part, whereby plaintiffs contracted to sell and deliver to defendant at Lowell, on February 20, 1905, 100 bales of cotton at nine cents per pound, and equally clear that defendant contracted to take and pay for the same. The proposition to sell seems to have been made by Rankin, who took Robinson in as a copartner in the transaction, with the consent of the defendant. At the time that defendant proposed to draw up the contract, a complete verbal agreement had been made between the parties, and the contract was reduced to writing and signed by plaintiff Rankin and the defendant. The fact that Robinson did not sign it does not invalidate the oral or written contract. The contract had been fully completed between the parties, and the reducing it to writing was not to make a new or different contract,

but evidently to preserve the written evidence of what had already been assented to. The plaintiff Robinson affirmed what his co-partner had done, for, according to Rankin's evidence, Robinson was en route to Charlotte and left Rankin to fix up the writing, and told Rankin after he "got it fixed up to phone him at Charlotte and he would buy the cotton." It seems to be generally held that a binding contract may be made between the parties although there is an understanding that it is to be reduced to writing, which writing is not completed by the signatures of all the parties. In the case of *Sanders v. Fruit Co.*, 144 N. Y., 209, the Court of Appeals of New York said: "Letters and telegrams which constitute an offer and acceptance of a proposition, complete in its terms, may constitute a binding contract, although there is an understanding that the agreement must be expressed in a formal writing, and one of the parties afterwards refuses to sign such agreement without material modification." Where the parties orally agree upon the terms of a contract and there is complete assent thereto, the suggestion to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the parol contract to be complete and binding without being put in writing. The question is largely one of intention. From the plaintiff's evidence it is plain the parties intended to contract and did contract before the written evidence of it was drawn up, and that defendant afterwards recognized the contract by asking an extension of time. The subject is fully discussed in 29 L. R. A., 431, note. The court very properly left it to the jury to determine whether the contract was made between the parties as alleged.

. . .

If it is the intention of the parties to be bound by the terms of their agreement, and the writing is only a means of preserving or showing it, the contract is complete; but if they do not intend to be bound until the writing is executed, the contract is incomplete. *Teal v. Templeton*, 149—32; *Gooding v. Moore*, 150—195; *Elks v. Ins. Co.*, 159—619; *Steamship Co. v. Swift*, 86 Me., 248, 29 Atl., 1063, 41 A. S. R., 545; *Sanders v. Pottlitzer Fruit Co.*, 144 N. Y., 209, 39 N. E., 75, 43 A. S. R., 757, 29 L. R. A., 431; *Rossiter v. Miller*, 6 E. R. C., 174; 6 R. C. L., 618; 9 Cyc., 280; *Contracts*, Cent. Dig., secs. 106-108, 156; *Dec. Dig.*, secs. 32, 39.

Where a writing is signed by one but is not to be binding until signed by another, as between the parties it is not complete, but it may be valid in the hands of an innocent third person. *Cowan v. Roberts*, 134—415; *Benton Co. Sav. Bank v. Boddicker*, 105 Iowa, 548, 75 N. W., 632, 45 L. R. A., 321; *Guild v. Thomas*, 54 Ala., 414, 25 A. R., 703. Where it appears upon the face of a bond that it was intended to be signed by all the parties whose names appear in it, it is generally held to be incomplete until all sign it, unless there is a waiver or estoppel. *Barnes v. Lewis*, 73—138; *R. R. v. Kitchin*, 91—39; *Bank v. Hunt*, 124—171; *Gwyn v. Patterson*, 72—189; *Sharp v. U. S.*, 4 Watts (Pa.), 21, 28 A. D., 676; *Weir v. Mead*, 101 Cal., 126, 40 A. S. R., 46; *School Dist. v. Lapping*, 100 Minn., 139, 110 N. W., 849, 12 L. R. A. (N. S.), 1105; 6 R. C. L., 616.

3. The terms must be certain and definite.

(35) SILVERTHORN v. FOWLE,

49 N. C., 362—1857.

Action of assumpsit.—The plaintiff declared on a special contract made with the defendant, that the latter was to “take a raft of timber at \$7.50 per thousand, which was to be prepared by plaintiff in Germanton Bay, and thence towed by defendant’s steamer to the town of Washington, and that it was to be ready when corn was done.” The contract was made in the month of March. It was proved that in June, that is, before the cultivation of the then growing crop was finished, the defendant called for the timber, but it was not ready. It was further proved that about the 1st of July, as soon as the growing crop was *laid by*, the raft was ready in the place designated. The defendant contended that the meaning of the contract was, that the raft was to be delivered and taken, when the planting of corn was finished. The plaintiff, on the other hand, insisted that the true meaning of the bargain was, that it was to be delivered and received as soon as the working of the crop was done.

His Honor left it to the jury, as a question of fact, to find from the evidence what the sense of the contract was, and whether the plaintiff had complied with it.

There was a verdict and judgment for the plaintiff, and defendant appealed.

NASH, C. J. It is certainly true, that the construction of a contract, whether verbal or written, is a matter of law, to be decided by the court. Where, however, technical, or unusual words, are used, and their meaning is to be gathered from experts, or persons acquainted with the particular art to which these words refer, or from authoritative definitions, as there may be conflicting evidence, it may present a question for the jury. 2 Parsons on Cont., 5. But where a contract presents such a case as may require the aid of a jury, the duty of the jury is to ascertain the meaning of the terms used, but it is still the duty of the court to decide the meaning of the contract. *Hutchison v. Banker*, 5 Mee. and Wells. Rep., 535. And if a contract is so worded that no definite meaning can be attached to it, it is the duty of the court so to instruct the jury. The court is no more at liberty to guess what was the meaning of the parties than is the jury. In this case the jury ought to have been instructed that the contract is so obscurely worded that it could not form the basis of judicial action. It is utterly impossible, from the words used, to say when

the lumber was to be delivered. The word "done" has no specific meaning, except in cookery. Bread is said to be done, and meat done, when they are sufficiently cooked for use as food. But when is corn done? The lumber was to be delivered "when corn was done." "Done" is not a word of art or trade, and requires no expert to tell us its meaning. The court left the sense of the contract to the jury upon the words, and other evidence, as a matter of fact. We have seen that, in a proper case for a jury, they pass only upon the meaning, or sense of the words used, the duty of expounding the contract still being the duty of the court. But the jury were no more competent to put a construction upon the word "done," in the connection in which it stands, than the court was. Used as it is in this contract, it is senseless, and not susceptible of explanation. We may guess at its meaning, but neither a court nor a jury are permitted to decide controversies by guessing, and no man can guess, to his own satisfaction, what the word here means. Judgment reversed and a *venire de novo*.

The degree of uncertainty which shall vitiate a deed (or other contract) must be such that the meaning can not be ascertained,—who, for example, are the contracting parties, or what is the subject of the contract. *Kea v. Robeson*, 40—373. A contract which is so uncertain in respect of its subject-matter that it neither identifies the thing by describing it nor furnishes any data by which certainty of identification can be attained, is void as well at law as in equity, and as incapable of supporting an action for damages as of supporting a bill for specific performance. *Ala. Min. Land Co. v. Jackson*, 121 Ala., 172, 77 A. S. R., 46.

Uncertainty in the sale of land.—A contract for the purchase of 30 or 35 acres of a tract containing 70 acres, without saying where it is to be taken, is void for uncertainty. *Grier v. Rhyne*, 69—346. So also the sale under execution of 3,000 acres from a tract of 5,000 is too indefinite. *Pemberton v. McKee*, 75—497. The description, "all of his interest in a piece of land adjoining the lands of J. J., J. K., and others," is void for uncertainty. *Harrell v. Butler*, 92—20. "One tract of land lying and being in the county aforesaid, adjoining the lands of A and B, containing 20 acres more or less," was held to be too indefinite. *Dickens v. Barnes*, 79—490. See also *Harrison v. Hahn*, 95—28. But in *Farmer v. Batts*, 83—387, the description "one tract containing 193 acres more or less, it being the interest in two shares, adjoining the lands of J. B., E. R., and others," was held to be definite enough to allow parol evidence to identify the land. Other cases considered sufficiently definite, *Reddick v. Leggat*, 7—539; *Proctor v. Pool*, 15—370; *Stewart v. Salmonds*, 79—518; *Cox v. Cox*, 91—256. Parol evidence may be used to "fit the description to the thing," *Perry v. Scott*, 109—374, and cases cited; *Lowe v. Harris*, 112—472; upon the maxim, "*Id certum est quod certum reddi potest*." *Hemphill v. Annis*, 119—514, and cases cited. Revisal, sec. 1605, authorizing parol evidence in such cases, if it adds any new rule, is not retroactive, nor does it repeal the Statute of Frauds. *Moore v. Fowle*, 139—p. 53. For other instances, see *Harris v. Woodard*, 130—580; *Cathey v. Lumber Co.*, 151—592; *Higdon v. Howell*, 167—455; *Patton v. Sluder*, 167—500.

Sale of trees.—"I agree to sell to D. any of my black walnut trees, not exceeding 15 in number," describing size and price, is sufficiently definite unless there are more than 15 trees filling the description. *Dunkart v. Rhineheart*, 89—354. The sale of "nine walnut trees" on certain land

conveys no title if there are more than nine, unless they are marked or otherwise separated. *Carpenter v. Medford*, 99—495. A deed conveying "portion of my cypress timber," is void for uncertainty. *Mizell v. Ruffin*, 113—20. A sale of standing timber which allows the purchaser an indefinite time to cut and remove the same is void for uncertainty. *Mfg. Co. v. Hobbs*, 128—46; *Bunch v. Lumber Co.*, 134—116; *Woody v. Timber Co.*, 141—471.

Personal property.—A mortgage on "ten new buggies" out of a larger number on hand, is indefinite and conveys no title. *Blakeley v. Patrick*, 67—40. A mortgage on "a one-horse wagon" where the mortgagor has four, is void. *Holman v. Whitaker*, 119—113. A mortgage on "one bale of good middling cotton that I may make or cause to be made or grown this year," is void for uncertainty in that it fails to designate the land where it is to be grown, or to identify the property so it could be separated. *Atkinson v. Graves*, 91—99. A mortgage conveying "my entire crop of every description," is too vague and indefinite. *Rountree v. Vinson*, 94—104. So also, "all the crop of corn and cotton raised by me the present year." *State v. Garris*, 98—733; or an agreement to release "three bales of cotton" to be grown. *McDaniel v. Allen*, 99—135. But otherwise in these cases, if the land is described on which the crop is to be grown. *Woodlief v. Harris*, 95—211; *Harris v. Jones*, 83—317. A mortgage conveying "two horses" when the mortgagor has three, or "one yoke of oxen" when he has more than one, is too indefinite. *Spivey v. Grant*, 96—214; otherwise where the mortgagor has only the number mentioned. *Sharp v. Pearce*, 74—600; *Goff v. Pope*, 83—127; *Lupton v. Lupton*, 117—30. Where the description is sufficient, but different from the actual condition, parol evidence may be used to identify the property, —as "a black horse" in a mortgage may be shown to be "a dark chestnut horse," *Hall v. Younts*, 87—291; or "one bay mule" to be a black mule, *Harris v. Woodard*, 96—232.

Other agreements.—"Whereas, J and A have purchased of C goods amounting to \$....., and have executed their note, etc.; now, if the said J and A fail to pay said note at maturity, I pledge myself to be responsible for the same." The payee is sufficiently designated. *Leach v. Fleming*, 85—447. That the seller would not engage in the same business in any territory where he had secured patronage, was too indefinite. *Shute v. Heath*, 131—281. An agreement between two physicians that one of them shall locate elsewhere upon a certain contingency, "if the field is not large then than now," is too indefinite. *Teague v. Schaub*, 133—458. Defendant asked plaintiff to build a barn on his (plaintiff's) own land and agreed to furnish part of the money, and afterwards refused to do so; plaintiff spent about \$75 in preparing to build the barn, and did not complete it because he did not need it except for defendant's use. The court held the terms too indefinite to constitute a contract. *Thomas v. Shooting Club*, 123—285. See also *Nash v. Ferrabow*, 115—303, for indefinite agreement. In the case of *Kent v. Edmondston*, 49—530, a contract of warranty in the sale of a jack, the writing was held to be too indefinite, but the defendant was bound by the parol warranty.

See generally *Clark Cont.*, pp. 43, 44; 1 *Page Cont.*, sec. 28; 9 *Cyc.*, 248 to 251; 6 *R. C. L.*, 643.

CHAPTER III.

FORM OF AGREEMENT.

Sec. 1. Contracts of record.**1. Judgments.**

(36) MOORE v. NOWELL,

94 N. C., 265—1886.

This was a civil action heard on demurrer to the complaint.

On the 9th day of June, 1879, one W. K. Davis obtained three judgments against J. J. Nowell and others, in a court of a Justice of the Peace; one for \$79.32, one for \$155.62, and one for \$80.34, all of which were duly docketed. On the 9th day of February, 1885, he transferred these judgments to the plaintiff for value and in writing. J. J. Nowell died and M. A. Nowell was appointed his administratrix. The plaintiff brought his action in the Superior Court on the three judgments together.

The defendant demurred to the complaint on the following grounds: 1. That the judgments sued on are not negotiable or assignable at law, so as to give the plaintiff the right of action at law thereon in his own name. . . .

His Honor overruled the demurrer, and gave judgment final against the defendant, from which an appeal was taken.

MERRIMON, J. Judgments, whether they be granted by a Justice of the Peace, or a court of record, are assignable either in writing or by merely verbal transfer, so as to pass the equitable title to them to the purchaser. *Winberry v. Koonce*, 83 N. C., 351.

The judgments mentioned and described in the complaint were assigned to the plaintiff in writing, for value, and he became the complete equitable owner of them, and "the real party in interest." The person in whose name they were taken has only the naked legal title to them, and he holds that for the plaintiff.

It is insisted, however, that the statute (*The Code*, sec. 177), provides that, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract," and that the judgments are things in action "not arising out of contract."

We can not concur in this view. Judgments are, it is true, not

ordinarily and always and for all purposes treated as contracts, as was decided in *McDonald v. Dickson*, 87 N. C., 404; but in the sense of distinguishing them from causes of action arising *ex delicto*, they are contracts, and are classed in the law as contracts of record, and of the highest dignity. They possess the quality of engagement, by implication and force of the law, on the part of the judgment debtor, to pay the sum of money adjudged to be due the judgment creditor. It is said that contracts or obligations *ex contractu* are of three descriptions, and they may be classed, with reference to their respective order or degrees of superiority, as follows: 1. Contracts of Record; 2. Specialties; 3. Simple Contracts.

Contracts of Record consist of *judgments*, *recognizances*, etc. Chitty on Cont., 3. See also the dissenting opinion of Justice Ruffin, in *McDonald v. Dickson*, *supra*.

The term "contract," as employed in the statute just cited, is used in its broadest legal sense—in a fundamental sense—and implies and embraces all things in action, that have the nature or legal quality of a contract as defined by law. It is employed in a leading and distinguishing sense, in the formation of a system of procedure.

Therefore, the judgments sued upon in this action do arise out of contract, and the plaintiff, as assignee, may maintain an action upon them in his own name. . . . Affirmed.

A judgment is not a contract in the sense contemplated by the statute, The Code, sec. 172, so that a promise in writing or a partial payment will prevent the bar of the Statute of Limitations. Clark's Code, sec. 172; *McDonald v. Dickson*, 87—404; *Hughes v. Boone*, 114—54; *McCaskill v. McKinnon*, 121—192; *Alson v. Dahl*, 99 Minn., 433, 109 N. W., 1001, 116 A. S. R., 435; *Rockwell v. Butler*, 17 Colo., 290, 17 L. R. A., 611; *Wadsworth v. Henderson*, 16 Fed., 447; *Gutta-Percha, etc., Co. v. Mayor*, 108 N. Y., 276, 15 N. E., 402, 2 A. S. R., 412. A judgment is not such a contract as comes within the provision of the constitution against impairing the obligation of a contract. *Louisiana v. Mayor of New Orleans*, 109 U. S., 285; *Morley v. Lake Sh. & Mich. R. R.*, 146 U. S., 162.

For discussion of Judgment as Contract, see 1 Black on Judgments, secs. 7-11; 2 Page on Cont., secs. 544-552; 2 Parsons on Cont., 887; Clark on Cont., p. 49; 23 Cyc., 673; 7 Am. & Eng. Encyc. p. 93 and vol. 17, pp. 763, 764.

For kinds of judgments and manner of entering, see Clark's Code, secs. 384-390, and cases cited; secs. 424-436, and cases cited. Controversy without action, secs. 567, 568; confession of judgment, secs. 570—572; executions, sec. 437 *et seq.* Rev., 555-579, 580-582, 615-627, 803-805.

An erroneous judgment is one rendered according to the course and practice of the court but contrary to law; that is, based upon an erroneous application of legal principles, as where the judgment exceeds the amount mentioned in the writ, or the required notice has not been given. An irregular judgment is one contrary to the course and practice of the court, as one against an infant with no guardian to represent him. A void judgment is one which has only the semblance of a judgment, as where the court has no jurisdiction or the party has not been served

with summons. An erroneous or an irregular judgment is valid until vacated or reversed, while a void judgment is a nullity. *Stafford v. Gallops*, 123—19; *McKee v. Angel*, 90—60; *Card v. Finch*, 142—140; *Skinner v. Moore*, 19—138; *Newsom v. Newsom*, 26—381; *Currie v. Mining Co.*, 157—209.

A consent judgment is the agreement of the parties put on file with the sanction and permission of the court, and neither party can change it or have the court to do so without the consent of the other party. *Edney v. Edney*, 81—1; *Vaughn v. Gooch*, 92—524; *Bank v. Commissioners*, 119—p. 226; *Massey v. Barbee*, 138—84; *Bank v. McEwen*, 160—415. It is valid though entered in vacation or out of the district. *West-hall v. High*, 141—337; *Bank v. Gilmer*, 118—668. A judgment entered by consent of counsel of record is binding on the client. *Hairston v. Garwood*, 123—345; *Stump v. Long*, 84—616; *Henry v. Hilliard*, 120—479; *Bradford v. Coit*, 77—72.

A foreign judgment is given the same faith and credit as a domestic judgment, but may be attacked for fraud. *Levi v. Gladstein*, 142—482; *Marsh v. R. R.*, 151—160; *Mottu v. Davis*, 151—237.

For the effect of a judgment as *res judicata*, estoppel, merger, etc., see Discharge by Judgment. *Tyler v. Capehart*, 125—64; *Shakespeare v. Land Co.*, 144—516.

2. Recognizances.

(37) STATE v. WHITE,

164 N. C., 408, 79 S. E., 297—1913.

The defendant was recognized by a Justice of the Peace to appear at the next term of the Superior Court. In lieu of bond, a certified check of \$200 was deposited by his surety, the Old Dominion Distributing Company. The defendant appeared before the Superior Court and pleaded guilty. The judge did not immediately dispose of the case, but a day or two later the defendant was called for the purpose of being sentenced, when it appeared that he had left the court and the State. Judgment *nisi* was entered, and a *sci. fa.* issued against the defendant and the surety. Upon the return of the *sci. fa.*, a judgment was rendered condemning the deposit, and the surety appealed.

ALLEN, J. A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act. *S. v. Smith*, 66 N. C., 620. It need not be executed by the parties, but is simply acknowledged by them, and a minute of the acknowledgment is entered by the court. *S. v. Edney*, 60 N. C., 471.

It binds the defendant to three things: 1. To appear and answer either to a specified charge or to such matters as may be objected to. 2. To stand and abide the judgment of the court. 3. Not to depart without leave of the court. *S. v. Schenck*, 138 N. C., 562.

It follows, therefore, upon these well settled principles, that the judgment *nisi* is regular and valid, as the defendant and his surety

entered into the recognizance, and the defendant departed without leave of court. . . . Affirmed.

A recognizance is an obligation acknowledged of record before a court or some judicial officer, by whom it is drawn out and certified. It is not executed by the parties, but acknowledged by them. The official character of the person before whom it is taken must appear, as that it was done in court or before some one authorized by law to take it, so that it may appear to be a record. *State v. Mills*, 13—558. The taking of recognizance consists in making and attesting a memorandum of the acknowledgment of a debt due the State, and of the conditions on which it is to be defeated. *State v. Houston*, 74—549. An obligation taken in the form of a bond, signed and sealed by the defendants, is valid as a recognizance. *State v. Jones*, 88—683; *State v. Edney*, 60—464.

The defendant was recognized to appear, and having appeared and the cause being continued, he was required to give security for his appearance again; by leaving the court without doing this he forfeited his recognizance; and this would be so even after judgment. *State v. Smith*, 66—620; *State v. Morgan*, 136—593. A defendant recognized to appear at a regular term which is not held on account of sickness of the judge, is required to appear at the next regular or special term. *State v. Horton*, 123—695.

The principal in a recognizance is presumed to be in the possession of his bail. "They have him on a string and can pull it at any time." They may arrest him without process at any time or place, or depute someone else to take him. A forfeiture and conditional judgment does not deprive them of this right. *State v. Lingerfelt*, 107—775; *State v. Schenck*, 138—560. Money left in the hands of a surety on a recognizance as indemnity, may be applied to the payment of the amount adjudged by the court. *Smith v. Kiser*, 98—379.

Statutory regulations.—Witnesses recognized. Revisal, secs. 3203, 3204. Prisoner recognized. Revisal, 3207-3213. Proceedings on forfeiture. Rev. 3214-3229.

For further discussion of recognizance, see, *State v. Dorr*, 59 W. Va., 188, 53 S. E., 120, 115 A. S. R., 915, 5 L. R. A. (N. S.), 402; 34 Cyc., 540; 3 A. & E. Enc., 686; Recognizance, Cent. Dig., secs. 1-5; Dec. Dig., secs. 1-3.

Sec. 2. Contracts under seal.

SMITH v. WILLIAMS, 5 N. C., 426—1810. The solemnity of sealed instruments has been, from the earliest periods of the law, highly regarded; because the forms and ceremonies, which accompany them, bespeak deliberation in the parties, and afford a safe ground for courts and juries to ascertain and settle contested rights. This deliberation is inferred, not from any one circumstance attending the transaction, but as the general effect of the whole. Thus in *Plowd.*, 308, B, "It is said that deeds are received as a *lien final* to the party making them, although he received no consideration, in respect of the deliberate mode in which they are supposed to be made and executed; for, first, the deed is prepared and drawn; then the seal is affixed; and lastly, the contracting party delivers it, which is the consummation of his resolution." Hence it appears that the law gives to deeds a respect and importance which it denies to any other contracts; not an empty and unmeaning re-

spect, but such as properly arises from the existence of all those circumstances which are calculated to fix and make authentic the contracts of men. A contract can not be a deed, if either it is not prepared and drawn; if the seal be not affixed, or if it be not delivered.

1. Essentials of such contracts.

(38) STRAIN v. FITZGERALD,

128 N. C., 396, 38 S. E., 929—1901.

This was an action for the possession of land held by the defendant under a sheriff's sale for taxes. It was admitted that the plaintiff was entitled to recover, unless the defendant acquired title by the sheriff's deed under the tax sale. The defendant offered in evidence the record of deeds of Durham County, which contained the form of a deed, signed by the sheriff, but without a seal. This was excluded. Judgment for the plaintiff, and defendant appealed. Affirmed.

FURCHES, C. J. . . . A deed is an instrument of *writing signed, sealed and delivered*. 2 Blk. Com., star page 395. The *seal* is what distinguishes it from a parol or simple contract. Land can only be conveyed by deed, that is, an instrument of writing signed, sealed and delivered. A paper, in form a deed, is not a deed without a seal. And to presume a seal is to presume the very matter at issue. There can be no presumption of a fact, unless other facts are proved or admitted, that form what is called in law a chain, that necessarily leads the mind from the facts proved or admitted to the fact to be proved—"a chain" of facts. One fact, if proved, does not form a "chain" of facts. In this case there is but one fact, as we understand it, that the defendants rely on to prove a seal, that is to prove a deed, and that is, that the paper on the registration books says, "Given under my hand and seal." But for this they would have nothing. And when it is considered that the paper they offer is in the exact words of the form prescribed by the Legislature for sheriff's deeds in sales for taxes, which has no seal, this fact loses any force it might be supposed to have. The error was originally committed by the Legislature and then by the sheriff, in following the form prescribed by the Legislature. But defendants want the court to presume that the sheriff of Durham County knew more than the Legislature. This, we think, may be called a *violent* presumption, in the sense that it violates the rule of presumptions and of common sense.

To adopt the reasoning of defendants would lead us into the adoption of a logic that can not be sustained—that the inferior is greater than the superior, that a part is greater than the whole.

We have said in *Patterson v. Galliher*, that the original is not good. Shall we say now that a copy is? We can not do so.

In the same case, 130—600, it was held that evidence might be introduced to show that there was a seal. This defect in the tax deeds was remedied by Rev. 949a. See also, *Patterson v. Galliher*, 122—511; *Floyd v. Ricks*, 14 Ark., 286, 58 A. D., 374; *Sterling v. Park*, 129 Ga., 309, 58 S. E., 828, 121 A. S. R., 224, 13 L. R. A. (N. S.), 298.

(39) GRAHAM v. HOLT,

25 N. C., 300, 40 A. D., 408—1843.

This was an action of debt on a bond for \$265, executed in the following manner: The plaintiff's intestate, the defendant and J. H. having been partners in a store, when they came to dispose of the goods, the defendant agreed to take the stock and pay the plaintiff and J. H. for their shares in nine months time; later when they met to complete the arrangement, the inventory was not present to fix the amount due each; the defendant signed and sealed the bond in question, leaving the amount blank, and delivered it to J. H., with instructions to examine the inventory, fill up the bond with the proper amount and deliver it to the plaintiff; this was done, and the defendant refused to pay the bond. Upon this evidence the court, being of opinion that the plaintiff could not recover, gave judgment for the defendant, and the plaintiff appealed.

Affirmed.

DANIEL, J. A bond is the acknowledgment of a debt under seal, the debt being therein particularly specified. In every good bond there must be an obligor and an obligee, and a sum in which the former is bound. *Shep. Touch.*, 56; *Com. Dig. Obligation A.*; *Hurleston*, 2. In New York *ex parte Therwin*, 8 Cowen, 118, and some other American cases, the *nisi prius* decision before Lord Mansfield of *Traxira v. Evans*, 1 Anst., 229, *in nota* has been followed. That case was where a party executed a bond with blank spaces for the name and sum, and sent an agent, without power of attorney under seal, to raise money on it, the agent accordingly filled up the blanks with the sum and the obligee's name, and delivered the bond to him. On the plea of *non est factum* the bond was considered well executed. But the case of *Traxira v. Evans* has been by this court twice overruled, as attempting to establish a distinction in the mode of executing deeds by attorney, where the object was to raise or secure money, and when it was to operate as a conveyance—the first, by a power of attorney not sealed, the other with a power of attorney under seal. The notion with us has always been, what we learned from *Co. Litt.*, 52 (a), and the *Touchstone*, 57, that he who executes a deed as agent for an-

other, be it for money or other property, must be armed with authority under seal. *McKee v. Hicks*, 13—379; *Davenport v. Speight*, 19—382. The insertion of the sum in the blank space was intended to consummate the deed; it was done without *legal* authority, and the instrument is void as a bond. . . .

To the same effect see *Blackwell v. Lane*, 20—245; *Marsh v. Brooks*, 33—409; *Phelps v. Call*, 29—262; *Kent v. Edmondston*, 49—530; *Barden v. Sutherland*, 70—528; *Bland v. O'Hagan*, 64—471; *McKee v. Hicks*, 13—377; *Davenport v. Sleight*, 19—382, 31 A. D., 420; *Williams v. Crutcher*, 5 How. (Miss.) 71, 35 A. D., 422. That a deed or bond executed in blank may be filled up by a third person duly authorized is recognized, but the cases differ as to what is sufficient authority, some requiring authority under seal, the strict rule of the common law, and others recognizing parol authority. *Stahl v. Berger*, 10 Serg. & R., 170, 13 A. D., 666; *Upton v. Archer*, 41 Cal., 85, 10 A. R., 266; *Cribben v. Deal*, 21 Ore., 211, 28 A. S. R., 746; *Richards v. Day*, 137 N. Y., 183, 33 A. S. R., 704; *Mahoney v. Salsbury*, 83 Neb., 488, 119 N. W., 144, 131 A. S. R., 647; *McCleerey v. Wakefield*, 76 Iowa, 529, 41 N. W., 210, 2 L. R. A., 529; *Van Dyke v. Van Dyke*, 119 Ga., 830, 47 S. E., 192.

In *Blacknall v. Parrish*, 59—70, the instrument was invalid as a deed, but was valid as a contract to convey. In *Humphreys v. Finch*, 97—303, the amount was left blank and then filled by the principal for more than the surety intended, and the surety was held liable on the ground of estoppel. In *Rollins v. Ebbs*, 137—355 and 138—140, a guardian bond was signed by the sureties, with the penalty blank, and this was afterwards filled in by the guardian; the bond was held to be valid.

(40) WALKER, Admr., v. ROBERT WALKER,
35 N. C., 335—1852.

This was an action of debt on a single bill for \$40, and was tried on *non est factum*, payment at and after the day. From a verdict and judgment for the plaintiff, the defendant appealed.

PEARSON, J. His Honor charged, "That where the execution of a sealed instrument was proved, the law inferred that it was just, and founded upon a just consideration." In this there is error.

We are not aware of any rule of law by which a consideration is inferred from the fact of the execution of a sealed instrument. No consideration is necessary in order to give validity to a deed. It derives its efficiency from the solemnity of its execution—the acts of sealing and delivery, not upon the idea that the seal imports a consideration, but because it is his solemn *act* and *deed*, and is therefore obligatory. No consideration being necessary to give validity to a deed, it follows that the law does not, from the fact of execution, make any inference one way or the other in reference to a consideration. A misapprehension of this subject may have arisen from the fact that in deeds of conveyance, operating under the statute of uses, either a valuable or a good consideration is necessary in order to raise the use. But the general rule is, a deed is valid without a consideration. A voluntary bond for

money, executed to a stranger, and professing on its face to be without consideration, and for mere friendship, is binding. . . .

That no consideration is necessary, see also *Woodall v. Prevatt*, 45—199; *Harrell v. Watson*, 63—454; *Angier v. Howard*, 94—27; *Howard v. Turner*, 125—107; *Webster v. Bailey*, 118—p. 194; *Ducker v. Whitson*, 112—44; *Littlejohn v. Patillo*, 9—302.

By reason of the efficacy which the statute gives to registration, all deeds are put upon the footing of feoffments, which take effect from livery of seisin, and need no consideration. *Love v. Harbin*, 87—249; *Mosely v. Mosely*, 87—69; *Ivey v. Granberry*, 66—223; *Hogan v. Strayhorn*, 65—279.

Where the action on a contract under seal is purely legal in its nature, the consideration is not necessary and can not be inquired into; but where equitable relief is sought, the consideration is necessary and may be inquired into. *Jennings v. Hinton*, 128—p. 217; *Flaum v. Wallace*, 103—p. 313; *Woodall v. Prevatt*, 45—199; *Buxly v. Buxton*, 92—479, *Bryan v. Foy*, 69—45; *Hurdle v. Richardson*, 52—16.

An endorsement under seal on the back of a deed is not a conveyance of the land described in the deed, but may be a contract to convey. *Joines v. Johnson*, 133—487; *Tunstall v. Cobb*, 109—316; *Linker v. Long*, 64—296; as to an entry on the record of a deed, see *Brown v. Davis*, 109—23; *Woodcock v. Merrimon*, 122—731.

The consideration of a contract under seal may also be inquired into to see whether or not it is illegal. *Brown v. Kinsey*, 81—245; *Harrell v. Watson*, 63—454.

2. Signing.

(41) DEVEREUX v. McMAHON,

108 N. C., 134, 12 S. E., 902, 12 L. R. A., 205—1891.

This was a civil action for the possession of land, and the facts appear sufficiently in the opinion. The defendant claimed, 1. That there was no sufficient signing of the deed; 2. That it was not properly registered; 3. That there was no evidence of delivery. There was a verdict and judgment for the plaintiff, and defendant appealed.

AVERY, J. . . . The last clause of the original deed and the attestation clause, with the signatures, were as follows:

"In witness whereof, the said Thomas Alexander hath hereunto signed his name and affixed his seal, the day and date above written. X (Seal.)

"Signed, sealed and delivered in presence of X John Cobb, witness towards of what was *sed*, Thomas Alexander did agree to the deed. D. S. C."

The same portion of the deed was recorded in the Register's office as follows:

"In witness whereof, the said Thomas Alexander hath hereunto signed his name and fixed his seal, the day and date above written. X (Seal.)

"Witness:

"Signed, sealed and delivered in the presence of X John Cobb,

witness towards of what was *sed* Thomas Alexander did agree to the deed. Solomon Davis."

The defendant contended that the deed was not signed in accordance with the requirements of our statute of frauds (The Code, sec. 1554), and that the judge below should have instructed the jury that the plaintiff had failed to adduce any evidence tending to show title in himself, and could not therefore recover.

Under the Saxon rule in England, it was only required that deeds should be subscribed with the sign of the cross. It was not necessary that a seal should be attached. After the Norman conquest sealing became a requisite, but signing of all kinds ceased to be required. 3 Wash. R. P., 242; Coke Lit., 171, b; 2 Blac. Com., 309. After the statute of frauds was enacted it became essential that every deed purporting to convey land, and every other instrument required under its provisions to be in writing, should be signed by the party to be charged therewith.

It is now an established rule that the name of the party to be charged may be written by an agent in his presence and under his direction, the act of the authorized agent being theoretically the act of the principal. Tiedman on R. P., sec. 807; Pierce v. Hakes, 23 Pa. State, 231; Insurance Co. v. Brown, 30 N. J. Eq., 193; Browne on Stat. of Frauds, 12; Kime v. Brooks, 9 Ired., 218; Frost v. Deering, 21 Me., 156; Gardner v. Gardner, 6 Cush., 483.

Under the provisions of our statute (The Code, sec. 1554), all of the instruments enumerated are required to be in writing and signed by the party, etc., while in the statutes of some of the other States the word "subscribed" is substituted for signed. Modern text writers generally concur in the opinion that it is not essential that the signature should be placed at the end of the deed or other instrument, where the law requires signing only. Martindale on Conveyancing, sec. 6; 5 Am. & Eng. Enc., 441; Tiedman Real Prop., sec. 807.

In the construction of statutes in reference to wills a similar rule has been generally adopted. Signatures in the body of the will have been declared to constitute a sufficient compliance with the requirement that there should be a signing, and the courts have gone so far as to sustain the validity of the execution of a will, where the name of the testator was written under the names of the witnesses to the attestation clause after having been written also as a part of that clause by him. 7 Mews Jacobs Dig., 879; 1 Williams on Executors, 60. It is conceded that where another person has already written the signature of one who is illiterate, the latter may adopt the signing subsequently by attaching a cross or other mark used by him as a substitute for an actual signature, though he could not so ratify the act of an agent who signed his

name not in his presence except by attaching such mark. The grantor in this case inquired who had written the deed, and was told that it was written by Mr. Thorpe, a lawyer, and in substance what were its contents. It was insisted with much force by the learned counsel on the argument, that when Thomas Alexander made the cross mark opposite to the seal and beneath the clause reciting his name, he adopted the signing of his name in that clause, the name being in close proximity to the cross and seal. It is well established that any number of grantors may by delivery adopt a seal opposite to the name of the first of the number who signs the deed, there being a recital in it that they had attached their seals; while on the other hand where there is no such recital, a seal attached to the name will be deemed sufficient to constitute the instrument a deed. 3 Wash. Real Prop., 244, 245; Tiedman, *supra*, 808; Yarborough v. Monday, 2 Dev., 493.

It seems not unreasonable to be guided by the principle, so often invoked in the construction of deeds and wills, that the law will favor those who are *inops consilii* and illiterate, and attempt to arrive at and carry out their true intent by a liberal application of technical rules. Washburn, *supra*, at page 244, says: "Affixing a mark by the grantor against his name, though written by another, is a signing, although it do not appear that he could not write his own name." It being settled, then, that our statute does not require that the name should be subscribed at the end of the instrument, when written by the party to be charged in his own handwriting, it would seem to be an unreasonable discrimination against, instead of in favor of, an illiterate person to declare his conveyance null and void because he attempted by a mark placed in proximity to the seal at the end of the deed to adopt a signing of his name in the last clause of the instrument. The courts, since the enactment of the statute of frauds (29 Charles II), have used the maxim *quod facit per alium facit per se* with great liberality, especially in making auctioneers by implication of law, the agents of those who bid for land at sales. In construing the act of making the mark in this case as an adoption of the signature just above it in the body of the deed, we can foresee no greater danger of opening the door for the evasion of the statute of frauds than in any other case where the mark is used and placed in juxtaposition to the written name. In either case the execution of the instrument must be ordinarily shown by the acknowledgment of the maker, or the testimony of a witness who saw it made, and even where both the maker and the subscribing witness may have died, the necessity for proving the genuineness of the signature of the witness or some distinguishing feature in the mark made by the grantor, is an ample guaranty that the opportunity or incentive

to evade the statute of frauds will not be enhanced by sustaining the validity of the signing of Thomas Alexander. *Davis v. Higgins*, 91 N. C., 382. If there had been no witness to the deed, then it could not have been admitted to probate without proof that the mark was habitually used by Alexander as a substitute for signing his name, and that there was some peculiarity in its appearance which distinguished it from other marks and enabled the witness to recognize it as he would the peculiarities of handwriting. *Sellers v. Sellers*, 98 N. C., 16; *State v. Byrd*, 93 N. C., 624; *Howell v. Ray*, 92 N. C., 510. In support of this view, Justice *Merrimon*, delivering the opinion of the court in *State v. Byrd*, *supra*, said: "While generally a mere cross-mark employed by a person who can not write, as evidence that he executed a paper-writing to which it is affixed, can not be proven, yet a person may have a mark so peculiar and so uniformly used by him for such purpose as that it may become well known as his mark, and may be proven just as the signature of one who writes may be proven to be in his own handwriting. A mark, like the signature of a party, is intended to be evidence of the fact that the party making it made it, and identifies himself with the paper-writing signed in the way and for the purpose indicated in it, and it is just as binding ordinarily without a subscribing witness as with one, but it may be proven as a signature may be by one who saw it made, or who heard the maker acknowledge it to be his, and the maker himself is generally a competent witness to prove that he made it." *Howell v. Ray*, 92 N. C., 510. We have reproduced this extract to make it clear that we are sustained by an adjudication of this court, in which it is laid down as a principle, in the most explicit way, that an instrument purporting to be a deed and required to be in writing and signed by the party charged thereby, is not void upon its face because the maker or grantor has signed by making a simple cross, nor even if there is no witness to such signing. The law still leaves the way open for proof of its execution by showing it to be a peculiar substitute habitually used by the grantor, instead of an ordinary signature, or for evidence from an eye witness that he saw the mark attached, just as he could testify to the act of subscribing the name. Our view of the subject is sustained by reason and the current of authority. While it is not probable that any case precisely similar in all respects to that under consideration has ever arisen, the principle announced finds abundant support in the adjudications of other courts and the conclusions deduced from them by leading writers upon the subject of deeds and conveyances. *Lawson Rights & Rem.*, vol. 5, sec. 2270, says a person physically unable, or too illiterate, to write his name, may sign by making a cross, a straight or crooked line, a

dot or any other symbol. In Martindale on Conveyancing, sec. 190, the rule is stated as follows: "As to what will constitute a sufficient signing, it may be observed that it is not necessary that the party should write his own name; his mark is sufficient, though he be able to write." In section 6 the same author says: "It seems that putting initials to a document, the name appearing elsewhere, is a sufficient signing to satisfy the requirements of the statute." If the initial letters of one's name be allowed to serve as a substitute for a formal signature because the name is signed in full in the body of the deed, why should we hold that a mark, the making or distinctive character of which is susceptible of proof, is insufficient under similar circumstances?

The second ground of exception was that the deed was not lawfully and properly registered. The certificate of probate and fiat are as follows: "State of North Carolina—Nash County. I, John T. Morgan, Clerk of the Superior Court, do hereby certify that the execution of the annexed deed was this day proven before me by the oath and examination of Solomon Davis, the subscribing witness thereto, who says that the deed was signed and delivered in his presence January 13, 1888, to the grantee for the purposes therein expressed. Witness my hand and official seal, this 20th day of January, 1888." (Signed and sealed by the Clerk.)

"State of North Carolina—Halifax County. In the Superior Court, February 9th, 1888. The foregoing certificate of John T. Morgan, Clerk of the Superior Court of Nash County, duly attested by his official seal, is adjudged to be correct. Let the instrument, with the certificate, be registered." (Signed John T. Gregory, Clerk Superior Court.)

"Filed for registration February 9th, 1888." (Signed L. Vinson, Register of Deeds.)

If the objection to the probate is based upon the ground that the original deed shows that Solomon Davis, instead of signing his full name to the attestation, wrote the letters "D. S. C.," and the Register recorded the signature "Solomon Davis," we think it is clearly untenable. Registration is not rendered void by reason of a mistake by the officer in recording deeds, but the registration is presumptively correct, and the remedy for such defective record is to demand the original, which, if legible, is the highest evidence of the form of the deed and the probate. *Davis v. Inscoe*, 84 N. C., 396; *Love's Extrs. v. Harbin*, 87 N. C., 249. When this case was brought to this court by a former appeal (102 N. C., 284), we held that the fact that a witness had made a cross-mark in attesting a deed, did not affect his competency to prove its execution. See also 5 Lawson, sec. 2271; *Nelins v. Brickell*, 1 Haywood, 19. Upon the principle already announced in discussing the signature

of the grantor, there can be no further controversy as to his eligibility, when it appears that he used characters so peculiar as a substitute for signing his name. *Tatom v. White*, 95 N. C., 453; *State v. Byrd*, *supra*; *Sellers v. Sellers*, *supra*; *Martindale*, sec. 6.

His testimony was as follows: "I witnessed the deed; I saw Tom sign the deed, and he handed it to me and asked me to witness it; that is my name, D. S. for Davis, C. for Solomon; that is the way I sign it; the rest was put there merely to fill in; I thought the old man was in his right mind; I did not hear any one read the deed to Tom; Tom asked Basil if he had got the deed fixed up; he said yes; Tom asked who fixed it; he said Mr. Thorpe, a lawyer, and told him what was in it; Tom signed the deed about twelve o'clock in the day, and died about twelve o'clock that night. I handed the deed either to Basil in Tom's presence, or back to Tom, and he handed it to Basil."

We think that though there was a mistake in recording the deed, it did not affect the right of the plaintiff given by statute to read the record, as already stated, subject to the right of defendant, if the original could be produced, to correct such mistakes by its introduction. The deed was properly proven by Solomon Davis, who was a competent witness. The effect of showing the mistake of the Register of Deeds was not to annul the probate, not even to destroy the competency of the copy upon the book as evidence, but simply to rebut the presumption that the copy was correct, and open the way for the consideration and discussion of the question, whether the paper-writing, in its original shape, was upon its face an instrument that, under our statute, might be probated and admitted to registration. Defendant's counsel insisted that there was no evidence of delivery. Though neither proof of possession of the deed by the grantee alone, nor evidence of the handwriting of the bargainor, unconnected with the facts, will raise a presumption of delivery so as to dispense with actual proof of it, yet when both the signing by the grantor and possession of the grantee are shown, there is *prima facie* evidence of delivery. *Williams v. Springs*, 7 Ired., 384; *Whitsell v. Mebane*, 64 N. C., 345; *Ingram v. Hall*, 1 Haywood, 193. But the witness, Davis, testified that when the deed was handed to him by the grantor, he either handed it in his presence and with his acquiescence to the grantee, Basil Devereux, or he returned it to Alexander, who handed it to Devereux. That was evidence, if believed, of an actual delivery. The failure to read a deed, or the misrecital, of its contents to an illiterate grantor who asks to know what it contains, constitutes a fraud in the *factum*, and on proof of these facts the instrument was formerly treated as void in a court of law, and can now be attacked without initiating a direct proceeding to impeach it. But

where a grantee, though an illiterate man, does not demand that the deed shall be read, and all of the testimony tends to show that a witness told him in substance what its provisions were, there is no evidence of fraud to be submitted to the jury. *School Com. v. Kesler*, 67 N. C., 443; *Nicholls v. Holmes*, 1 Jones, 360; *Canoy v. Troutman*, 7 Ired., 155.

There is no error, and the judgment must be affirmed.

Affirmed.

Making mark is a sufficient signing when proven. *State v. Byrd*, 93—624; and the words "his mark" need not be used. *Sellers v. Sellers*, 98—13; *Tatom v. White*, 95—453; *Hinsman v. Hinsman*, 52—511.

The signature may be in the body of the deed instead of at the end. "It is, as a matter of law, immaterial where the signature be; it is as binding when found anywhere else in the paper as it is when appearing at the end, the question being always open to the jury whether the party, by not signing it regularly at the foot, meant to be bound by it as it then stood, or whether he left it so unsigned because he refused to complete it." *Kenck v. Parchen*, 22 Mont., 519, 57 Pac., 94, 74 A. S. R., 625; *Richards v. Lumber Co.*, 158, p. 156; *Boger v. Lumber Co.*, 165—557; 6 R. C. L., 640; *Deeds*, Cent. Dig., sec. 89.

Instruments under seal signed by one whose name does not appear in the body of the writing are not properly executed and binding, unless there is enough in the instrument to indicate its character and effect as to such obligor. *Kerns v. Peeler*, 49—226; *Gray v. Mathis*, 52—502; *Estes v. Jackson*, 111—145; *King v. Rhew*, 108—696, 28 A. S. R., 76; *Carson v. Ins. Co.*, 161—441; *Payne v. Parker*, 10 Me., 178, 25 A. D., 221; *Stone v. Sledge*, 87 Tex., 49, 47 A. S. R., 65; *Jason v. Johnson*, 74 N. J. L., 529, 67 Atl., 42, 122 A. S. R., 402; *Cordano v. Wright*, 159 Cal., 610, 115 Pac., 227, 24 Ann. Cas., 1044; *Sterling v. Park*, 129 Ga., 309, 58 S. E., 828, 121 A. S. R., 224, 13 L. R. A. (N. S.), 298; 9 Cyc., 301; so a bail bond signed by the defendant as surety but his name was not inserted in the bond, was held to be invalid. *Adams v. Hedgepeth*, 50—237; but an administration bond signed in the same way was held to be valid, *Vanhook v. Barnett*, 15—268, and also a bond of the clerk of superior court, *Howell v. Parsons*, 89—230. In the latter cases, the nature of the bond and the office of the principal were sufficient to show the nature of the obligation.

An indenture was a deed made by two or more parties, in as many parts as there were parties, and these parts were separated by cutting or indenting so as to correspond with each other. A deed poll was a deed executed by one party, 2 Blk., 295; that is, it was signed by the grantor and made binding upon the grantee by acceptance. *Maynard v. Moore*, 76—158; *Harshaw v. McKesson*, 65—688; *Herring v. Lumber Co.*, 163—481; *Mordecai's Lectures*, 818.

(42) KIME v. BROOKS,

31 N. C., 218—1848.

This was an action of debt on a bond. The maker of the bond could not write, by reason of age and infirmity, and he directed his daughter to sign the paper for him; for that purpose he laid the paper down on the table, turned away and went out into the yard; the daughter signed the paper and delivered it; she said that when she signed it she could hear her father talking in the yard, but that she did not see him, nor think that he could see her; the

father never objected afterward. The court instructed the jury that this would make a sufficient signing and delivery. There was a verdict and judgment for the plaintiff, and the defendant appealed.

RUFFIN, C. J. The court does not concur in the instructions to the jury. The Touchstone, 57, states the rule upon which the case depends in a short, but very clear manner. "Where one person delivers an instrument as the act of another person, who is present, no deed conferring an authority is requisite. But a person can not, unless authorized by deed, execute an instrument as the act of a person who is absent; and every letter of attorney must be by deed." The plain meaning of the passage is, that what a person does in the presence of another, in his name and by his direction, is the act of the latter, as if done exclusively in his own person; but that what is done out of his presence, though by his direction and in his name, can not in law be considered an act in *propria persona*, but one done by authority; and that when the authority is to execute a deed by signing, sealing and delivering it for the party, and especially the delivering, it can not be oral, but must be by deed. There are some instances in modern times, in which judges have been moved by the hardship and justice of the case to depart in some degree from this rule, though so precise in its terms and so wholesome in its general application. But in this State it has been scrupulously adhered to, when it operated to the prejudice of claims as just in all respects as the present, if not more so. . . . The court holds, therefore, that it was indispensable to the validity of this instrument, as a bond, that the party should have been present at its execution and delivery. . . .

Reversed.

The obligor can direct another in his presence to sign his name to a sealed instrument, and it is sufficient; but if the obligor is not present, the agent must have authority under seal. *Delius v. Cawthorne*, 13—90; *Harshaw v. McKesson*, 65—688; *Bryson v. Lucas*, 84—680; *Boyd v. Turpin*, 94—139; *Cadell v. Allen*, 99—542; *Drumright v. Philpot*, 16 Ga., 424, 60 A. D., 738; *Lewis v. Watson*, 98 Ala., 479, 39 A. S. R., 82; *Blaisdell v. Leach*, 101 Cal., 405, 40 A. S. R., 65; *Ford v. Ford*, 27 App. Cas. (D. C.), 401, 7 Ann. Cas., 245; *Gardner v. Gardner*, 5 Cush., 483, 52 A. D., 740.

3. Sealing.

What is a seal.—"Seals were properly emblems impressed on wax, or some material susceptible of receiving and retaining an impression. In this State, from necessity or from some accidental cause, our forefathers early adopted as a seal, or in lieu of one, a scrawl; and our courts have for a long period given to it all the efficiency of a seal—in fact, have considered it as a seal. In Vir-

ginia it is considered a seal, if in the writing it appears that the parties so called or so understood it, as, 'witness my hand and seal.' In our State no such rule has been established." *Yarborough v. Monday*, 13 N. C., 493.

A square piece of paper with a wafer is as much a seal as a scrawl with the word "seal" written in it, if intended by the parties as such; and in registration the register could only make a symbolical seal to stand as a copy. *Hughes v. Debnam*, 53—127. Whether there is a scrawl or seal is a question for the jury; whether what is used is sufficient as a seal, is a question for the judge. *Baird v. Reynolds*, 99—469; *State v. Worley*, 33—242. See also, *Cromwell v. Tate*, 7 Leigh, 301, 30 A. D., 506; *Hacker's Appeal*, 121 Penn., 192, 15 Atl., 500, 1 L. R. A., 861; *Seals*, Cent. Dig., sec. 4; Dec. Dig., sec. 3.

(43) *PICKENS v. RYMER*,

90 N. C., 282—1884.

This action was brought to recover the amount due on a note of which the following is a copy: "Twelve months after date we or either of us promise to pay to J. T. Pickens ninety dollars for value received of him, as witness our hands and seals, with interest from date. October 22, 1861."

T. B. Rymer.

(Signed) F. M. Ballew. (Seal.)

On this note two credits were endorsed—one November 1, 1869, and the other January 3, 1871.

Plaintiff proved the execution of the note, and defendant pleaded payment and the statute of limitations. The plaintiff's counsel submitted the note to the inspection of the court and admitted, that if it was not a note under seal, the defendant's plea of the statute of limitations would be a bar, and upon an intimation from the court that the jury would be instructed that it was not a note under seal as to the defendant, Rymer, plaintiff submitted to a judgment of nonsuit and appealed.

ASHE, J. The only question presented for the consideration of this court is whether there was error in the instruction His Honor intimated he would give the jury.

Such an instruction would have been manifestly erroneous. A seal is an essential requisite of a deed, and no writing without a seal can be a deed. *Shep. Touch.*, 56. *Blackstone* also lays it down as an indispensable requisite of a good deed (vol. 2, 304); and there is no question that two or more persons may adopt the same seal. There is abundant authority on this point. It was so held in *Yarborough v. Monday*, 3 Dev., 420, where this court said: "Two parties may adopt the same seal, and in that event it is the deed of both, otherwise it is the deed of one and the simple con-

tract of the other." To the same effect are *Hollis v. Pond*, 7 Hump., 222; *Pequaket Bridge v. Mathis*, 7 N. H., 232; *Bonham v. Lewis*, 3 Monroe (Ky.), 376; 4 Term Rep., 313, and 3 Ves., 578.

These authorities not only establish the principle that two or more persons may adopt one seal, but they establish the further principle that, whether the party subscribing a deed, opposite whose name there is no seal, intended to adopt the seal of another signer who has made his seal, is a question of fact for the jury, and the Judge can not upon inspection instruct the jury that it is or is not a deed of one of the parties, as that would be deciding both the law and the fact, and in this consisted the error committed by His Honor in the court below. He said he should instruct the jury that it was not the deed of the defendant. That was deciding both the law and the fact and leaving nothing for the jury to decide; whereas he should have told the jury that two persons may adopt the same seal, but whether it was the sealed or unsealed instrument of the defendant was a question of intention which was a fact to be determined by the jury, and the *onus* lay on the plaintiff to prove that the defendant adopted the seal or scroll. *Hollis v. Pond*, *supra*. And in the case of *Yarborough v. Monday*, *supra*, the court held the question whether both parties adopted the same seal was one for the jury and not for the Judge. And in the Kentucky case *Bonham v. Lewis*, *supra*, which was an action upon a note signed by two parties with only one seal opposite the name of the first signer, there was a demurrer to the declaration, and the court in their opinion say: "Where an instrument with one seal and two or more signers is alleged to be sealed by all, the court is not authorized to infer, from there being but one seal and two or more signers, that but one in fact sealed the instrument; and the party who contends that it is not his seal must reach the fact by way of plea, and as one seal may be the seal of many signers, the court from *bare inspection* of the paper and declaration can not decide that it is the seal of one only."

Error.

Venire de novo.

Two parties may adopt the same seal, and the instrument become the bond of both; otherwise it is the deed of one and the simple contract of the other. *Yarborough v. Monday*, 14—420; *Green v. Thornton*, 49—230; *Davis v. Goldston*, 53—28. In *Yarborough v. Monday*, 13—493, there were two parties and one seal. The court says, it is ordinarily taken to be the seal of the one whose name is written nearest, but it may be shown by other evidence that it was adopted by both. Henderson, C. J., in dissenting as to the necessity for further evidence, contends that the word "indenture" used in the instrument is sufficient. That the seal is opposite the name of the witness instead of the grantor does not destroy the validity of the deed. Harrell v. Butler, 92—20. See, *Davis v. Burton*, 3 Scam. (Ill.), 41, 36 A. D., 511; *Pequawhett Bridge v. Mathes*, 7 N. H., 230, 26 A. D., 737; 35 Cyc., 1173; 6 R. C. L., 642; *Seals*, Cent. Dig., sec. 7; *Dec. Dig.*, sec. 4.

Partners.—One partner can not bind the firm by seal unless he has authority under seal, but the obligation may be his sealed contract and the simple contract of the firm. *Burwell v. Linthicum*, 100—145; *Holland v. Clark*, 67—104; *Fisher v. Pender*, 52—483; *Froneberger v. Henry*, 51—548; *Taylor v. School Com.*, 50—98; *Osborn v. Mfg. Co.*, 50—177. But this distinction is now limited to such contracts as must be executed under seal; in all others the seal is surplusage. *Pipe and Foundry Co. v. Woltman*, 114—178.

Tax deeds.—Where the form of deed prescribed for sheriffs in tax sales did not contain a seal, but concluded "given under my hand and seal," the actual use of the seal was necessary, and the conveyance without it was void. *Patterson v. Galliher*, 122—511; *Fisher v. Owens*, 133—686; *Strain v. Fitzgerald*, 128—396. But in *Geer v. Geer*, 109—679, a deed without seal was held to be an equitable title, under the circumstances of the case. See also *Arnt v. Arrington*, 105—377.

Grants.—Grants issued by the State are proved by the seal and the fact that it does not appear of record that a scroll or imitation of the seal was copied thereon does not invalidate the registry. *Broadwell v. Morgan*, 142—475; *Aycock v. R. R.*, 89—323.

Mistake.—A seal attached by mistake may be corrected in equity, *Lynam v. Califer*, 64—572; or one omitted by mistake may be supplied. *McCown v. Sims*, 69—159.

See discussion of the origin and manner of signing, sealing and delivery, by *Haywood, J.*, in *Ingram v. Hall*, 2—193. *Mordecai's Lectures*, 807.

In some states it is necessary that there should be a recognition of the seal by words used in the body of the instrument. *Bradley Salt Co. v. Norfolk Imp. & Exp. Co.*, 95 Va., 461, 28 S. E., 567; *Grimsley v. Riley*, 5 Mo., 280, 32 A. D., 319. The use of the words "given under my hand and seal" will not make it a deed, if in fact no seal is used; nor will a seal generally be presumed from the use of such words. *Strain v. Fitzgerald*, 128—396; *Fisher v. Owens*, 132—686; *Dunlap v. Willett*, 158—317; *Burnett v. Young*, 107 Va., 184, 57 S. E., 641, 12 Ann. Cas., 982; 35 Cyc., 1172; *Hubbard v. Swofford Bros. Co.*, 209 Mo., 495, 108 S. W., 15, 123 A. S. R., 488.

In many States the necessity and effect of a seal have been modified or abolished by statute. *Sauger v. Warren*, 91 Tex., 472, 66 A. S. R., 913; 35 Cyc., 1168.

4. Delivery.

1. IN GENERAL.

(44) PHILLIPS v. HOUSTON, Admr.,

50 N. C., 302—1858.

This was an action of detinue for a slave. *Frances Phillips*, the plaintiff's mother and the defendant's intestate, asked one *Kinnair* to draw a deed of gift to the plaintiff for a slave. Thereupon *Kinnair* wrote the deed of gift to the plaintiff, and it was *signed and sealed* by the mother, and witnessed by *Kinnair* and one *Holland*. She delivered the deed to *Holland*, and requested him to take it to the courthouse and have it recorded. *Holland* failed to do this, but returned the deed to the donor. She then gave it to one *Kennedy*, with directions to deliver it to one *Moore*, with a request that he should take it to court and have it recorded.

Kennedy placed the deed among his papers, and forgot it until after the death of the donor, Mrs. Phillips; then he gave it to Moore, who had it proved and registered. The jury returned a verdict in favor of the plaintiff, subject to the opinion of the court, upon the question whether the deed was duly delivered, under the circumstances above stated. His Honor being of opinion with the plaintiff, gave judgment on the verdict, and defendant appealed.

BATTLE, J. In the case of *Hall v. Harris*, 40 N. C., 303, it was said by the court, that the delivery of a deed "depends upon the fact that a paper, *signed and sealed*, is put out of the possession of the maker." That, we think, is the true test, and if it appear that the grantor, or donor, has parted with the possession of the instrument to the grantee or donee, or to any other person for him, the delivery is complete, and the title of the property granted, or given thereby, passes. But it will be otherwise, if the grantor or donor retain any control over the deed; as if he, when he hands it to a third person, request him to keep it and deliver it to the person for whom it is intended, *unless* he shall call for it again. These principles will be found to govern all the cases beginning with *Tate v. Tate*, 21 N. C., 22, running through *Baldwin v. Maulsby*, 27 N. C., 505; *Snider v. Lockenour*, 37 N. C., 360; *Ellington v. Currie*, 40 N. C., 21; *Roe v. Lovick*, 43 N. C., 88; *Gaskill v. King*, 34 N. C., 211, and *Newlin v. Osborne*, 49 N. C., 157, down to *Airey v. Holmes*, 50 N. C., 142. Tried by the above-mentioned test, the delivery of the deed, in the present case, must be declared to be complete. The donor handed the paper, *signed and sealed*, to a third person, for the use of the donee, without any reservation whatever, and when it was returned to her, she immediately handed it to another person, for the donee, without the slightest intimation that she was to have any control over it. The delivery, however, was perfect, when the instrument was handed to the first person, and it made no difference whether it was registered before or after the donor's death. His Honor was right in giving judgment for the plaintiff, and the judgment must be affirmed.

Per Curiam.

Judgment affirmed.

(45) PARKER to the use of RESPASS v. LATHAM,
44 N. C., 138—1852.

This was an action of debt on a bond. Pleas, *non est factum*, and that plaintiff never acquired title to the bond by endorsement. The following is a copy of the bond and the endorsement:

"One day after date we promise to pay Martha A. Parker, guar-

dian of the minor heirs of James Parker, dec., the sum of three hundred and forty dollars for value received. Witness our hands and seals, this 26 May, 1848.

William Ellison. (Seal.)

D. H. Latham. (Seal.)

W. A. Lanier. (Seal.)

Witness:

D. H. Farrow.

On which was endorsed—

“Pay the within to Isaiah Respass, without recourse on me, June 3, 1848. (Signed) Martha A. Parker.”

Upon the facts, His Honor was of opinion with the plaintiff, and rendered judgment accordingly, from which defendant appealed.

NASH, C. J. The action is on a sealed instrument called a single bill, not assignable at common law, but made so by statute. A man by the name of Ellison is the principal, and it is admitted that the present defendants were his sureties. The bond is made payable to the plaintiff as guardian, and intended to raise money for the use of Ellison. It was executed by the defendants and Ellison, and sent by an agent to the plaintiff, who refused to accept it. Subsequently it was sent back to her by Ellison, with the endorsement as it now appears, written by him, with the request to her to sign it, for that Respass, for whose benefit the action was brought, would then advance the money upon it. She did so, and the sole inquiry presented to us, is as to the legal validity of the instrument.

Delivery is an essential part of every deed, and as there is no set form of words or of acts by which it may be done, any words or acts on the part of the obligor or grantor, which show the *animus disponendi*, will be sufficient. As if a deed be sealed and lying on a window, and the grantor say “there it is, take it as my deed,” or, “this will serve”—these are good deliveries. (Shep. Touch., 124, Thomas Coke 2, vol. 276.) It is not pretended that when first presented to Mrs. Parker there was any delivery, for she expressly refused to accept it; and acceptance by the grantee or obligee is as necessary to valid delivery as the transfer on the part of the obligor or grantor. *Woodman v. Coolbroth*, 7 Greenl. Rep., 181. But it is agreed that the second delivery was completed by the endorsement of the obligee. Without inquiring whether, under the special circumstances of this case, her endorsement was an acceptance or not, we think it was not such acceptance as bound these defendants. We have seen that the consent of the maker of a deed is essential to a delivery. If the circum-

stances go to show that he did not consent, it is not his deed, even though he signed and sealed it, and was bound by a previous contract to deliver it. Coolbroth's case, *supra*. If a man throws a deed on the table, and says nothing, and the other party takes it, this does not amount to a delivery, unless the jury find it was put there with an intent to deliver. Owen, 95; 1 Leon., 140; 1 Touch., 124, n. 28. If a patron draws a presentation in writing and puts his seal to it, and leaves it in his study, and the party for whom it is prepared gets it without the license or privity of the patron, and brings it to the Bishop, and is thereupon instituted and inducted, it is all void. (Yelverton, 7.) Where the first delivery of a deed fails for want of acceptance by the grantee, then a *new delivery* must be made; otherwise the deed is void. 13 Vin. Abrid. Title Deeds, n. 2, p. 27. What are the circumstances of this case? The instrument declared on was signed and sealed by Ellison and the two defendants, for the purpose of borrowing money from the plaintiff, Mrs. Parker. She refused to accept it. It was then *functus officio*, and to give it vitality a second or new delivery was necessary. To this second or new delivery the assent of the defendants was necessary, so as to bind them. There is nothing in the case to show that they did so assent; on the contrary, there is much to show they never did. The bond is dated the 26th of May, 1848, payable one day after date, and the money was for the use of Ellison, as we understand. On the 3d of June following, eight days thereafter, it is endorsed to Respass by Mrs. Parker, the obligee. It does not appear that the present defendants knew that the money was not received from her upon the first application. Again, when the instrument was presented to Mrs. Parker the second time, it was not for the purpose of getting money from her, for she had refused to advance it, but from Respass, who actually did advance it to Ellison—he was, in substance, the obligee. If the present defendants did know that it could not be procured from Mrs. Parker, but that Respass was to advance it, why was not the instrument made payable to the latter? The endorsement gave to Respass no additional security, for it discharged Mrs. Parker from all responsibility. It is obvious that Ellison managed the latter part of the business without consulting the defendants. If he could, without a renewed authority from the defendants, deliver it eight days after the first, why not in eight months? The instrument in its original concoction was not intended by defendants to be thrown into market to raise funds from any one who would advance them; but from a specified individual, and that person refusing to lend money upon it, it must be shown that the defendants agreed to the new intent, that is, to becoming bound to Respass, which does not appear.

But, it is argued on behalf of the plaintiff, that as by our Act of Assembly, bonds are made negotiable, that therefore they are transferable by endorsement as bills of exchange and notes of hand, and are governed by the same rules and regulations. That is true; after the endorsement, the laws governing bills of exchange and promissory notes do apply to them. But still the instrument being a sealed instrument must possess all the requisites to make it a good deed. If it be deficient in any such property, the endorsement can not supply the defect; it can not make that legal which never was so. Upon this point we consider the case of *Marsh v. Brooks*, 33 N. C., 409, full authority. In replying to this particular argument, the court say the instrument must be a perfect bond for money, before it can be negotiated; and further, although the law of the State makes bonds negotiable, yet their nature in their inception, and before endorsement, is not touched by the statute, and remains as at common law.

We think there is error in the judgment below.

Per Curiam. Judgment reversed, and *venire de novo* awarded.

For similar cases, see, *Whichard v. Jordan*, 51—54; *Dewey v. Cochran*, 49—184.

What constitutes delivery. 1. The grantor must part with control over the instrument. The delivery of the deed is its tradition from the maker to the person to whom it is made, or to some person for the use of the grantee. It is in all cases essential that the instrument pass out of and beyond the control of the grantor and into the actual or constructive control of the grantee; so long as the grantor retains control over or the right to recall the paper, it can not be said to have been delivered. *Weaver v. Weaver*, 159—18; *Dunlap v. Willett*, 153—317; *Gaylord v. Gaylord*, 150—222; *Tolar v. Tolar*, 16—460; *Blackwell v. Lane*, 20—245; *Waddell v. Waddell*, 36—475; *Smith v. Moore*, 149—185; *Fortune v. Hunt*, 149—358; *Brown v. Westerfield*, 47 Neb., 399, 53 A. S. R., 532; *Porter v. Woodhouse*, 59 Conn., 568, 21 A. S. R., 131, 13 L. R. A., 64; an intention that the instrument shall take effect though retained by the grantor, is not generally a sufficient delivery. *Baldwin v. Maulsby*, 27—505; *Jones v. Jones*, 6 Conn., 111, 16 A. D., 35; *Martin v. Flaherty*, 13 Mont., 96, 48 A. S. R., 415, 19 L. R. A., 242. The rule is not so strict in insurance contracts. *Xenos v. Wickham*, 13 E. R. C., 422; *Hardy v. Ins. Co.*, 154—430; *Manfg. Co. v. Assur. Co.*, 161—88; *Pender v. Ins. Co.*, 163—98.

The delivery of the deed is a question of fact to be determined by the jury from all the circumstances. *Floyd v. Taylor*, 34—47; *Williams v. Springs*, 29—384. But the fact that the wife saw the grantor "hand the deed" to her husband is not sufficient evidence of delivery; it must be delivered by the grantor as his deed. In this case the deed was not proved nor registered, and was found in the grantor's possession. *Johnson v. Cameron*, 136—243. If the deed has not been delivered to the grantee, or to anyone for him, his name could be erased; and if the grantor told one grantee to erase the name of another grantee before delivery, and then to have the deed registered, this is sufficient delivery, even though the deed was not registered. *Wetherington v. Williams*, 134—276.

2. **Delivery to third person.**—When the maker parts with the possession of a deed and directs that it be delivered to the grantee, without any condition expressed, there is a presumption that it was then delivered as a deed for the benefit of the grantee. *Morrow v. Alexander*,

25—388. Where a deed is given to an agent for the principal without the right of the grantor to recall it, the delivery is complete. *Bond v. Wilson*, 129—325. The delivery of a deed to a third person for the use of the grantee is sufficient, although such person is a stranger and not the agent of the grantee, provided the grantee assents to it. *Wesson v. Stephens*, 37—557; *Green v. Kornegay*, 49—66; and the grantee is presumed to assent unless shown to the contrary. *McLean v. Nelson*, 46—396. The grantee executed a deed to his infant son and delivered it to his wife for the benefit of his son, and this was a valid delivery. *Gaskill v. King*, 34—211. M. executed a note under seal payable to his daughter, and delivered it with a letter of instruction to a third person for the benefit of his daughter; this was sufficient delivery. *Ducker v. Whitson*, 112—44. But where the grantor handed the deed to a third person to hold till he called for it, and died without having called for it, there was no delivery, and a clause in the grantor's will giving to the grantee property "in addition to what I have given him by deed," is not sufficient to incorporate the deed into the will and pass title to the land. *Bailey v. Bailey*, 52—44; (and as to last point see also *Chambers v. McDaniel*, 28—226, and *Siler v. Dorsett*, 108—300). A constable's bond payable to the State, taken by one not authorized to take it, is void for want of delivery. *State v. Shirley*, 23—597; but if such bond is found in the custody of one whose duty it is to keep it, the proper delivery is presumed. *Battle v. Baird*, 118—854; *Kello v. Magett*, 18—414. See also, *Kirk v. Turner*, 16—14; *Robbins v. Rascoe*, 120—80; *Buchanan v. Clark*, 164—56; *Brown v. Westerfield*, 47 Neb., 399, 53 A. S. R., 532; *Munro v. Bowles*, 187 Ill., 346, 58 N. E., 331, 54 L. R. A., 865; *Renahan v. McAvoy*, 116 Md., 356, 81 Atl., 586, 38 L. R. A. (N. S.), 941; *Huddleston v. Hardy*, 164—210.

Where the grantor delivers the deed to a third person, to be delivered to the grantee after the grantor's death, it is a good delivery; but if the grantor retains the deed, and directs a third person after his death to get it and deliver it to the grantee, it is not valid. *Baldwin v. Maultsby*, 27—505; *Stone v. French*, 37 Kan., 145, 1 A. S. R., 237, and cases above cited.

Possession of the deed.—A deed signed and sealed by the grantor and found in the possession of the grantee is presumed to have been delivered, but this may be rebutted by evidence that it was obtained without the grantor's consent. *Whitman v. Shingleton*, 108—193; *Blume v. Bowman*, 24—338; *Clayton v. Liverman*, 20—238; *Gaskill v. King*, 34—211; *Moore v. Collins*, 15—384; *Devereux v. McMahon*, 108—134. Proof of the handwriting of the obligor and the possession of the bond by the obligee is evidence from which the jury may presume a delivery. *Williams v. Springs*, 29—384. But if no obligee is named in the bond, as when made payable to bearer, delivery to a particular person will not supply the defect, *Phelps v. Call*, 29—262; this, however, is held not to apply to corporation bonds payable to bearer. *Weith v. Wilmington*, 68—24.

2. PROBATE AND REGISTRATION AS EVIDENCE OF DELIVERY.

(46) HELMS v. AUSTIN,

116 N. C., 751, 21 S. E., 556—1895.

FAIRCLOTH, C. J. This was an action for partition before the Clerk, and was transferred to the Superior Court. The defendants denied that the plaintiffs had any interest in the land to be divided, which was equivalent to the plea of "sole seisin." The question arises upon three deeds made by Ennis Staton, of the first part, and "Sarah Staton, his wife and her heirs, named on the

back of this deed, of the other part," the said Ennis Staton reserving his life estate in the lands conveyed, and the consideration named is love and affection. On the back of each deed is endorsed the names of the several children of the grantor, the plaintiff's name being one each time. In the third deed the conveyance is to "Sarah Staton, his wife and her *children*," and in the endorsement on the back thereof, after repeating the names of the same children as in the other two, it is stated, "and if the said Sarah Staton should ever have any other child or children, that he or they shall have an equal share with the above *heirs*."

The deeds were dated September 13, 14, and 15, 1869, and were registered, after probate, on August 26, 1870, and September 2, 1870. . . .

The defendants insisted that these deeds were never delivered, and relied upon the endorsement on the deeds made by the Probate Judge at the time the deeds were acknowledged by the grantor and ordered to be registered, and upon subsequent acts and declarations of the grantor, to rebut the implication of delivery arising from the registration. The endorsement was as follows: "The cause of my giving my family my lands by deed as well as by will is in order to give the courses and distances of the same." It is admitted that Ennis Staton retained possession of the deeds after their registration, and remained in possession of the land and listed it for taxes until his death. These admitted facts are all consistent with the fact that the grantor retained a life estate, and, taken alone, have no tendency to rebut the implication of delivery arising from the registration.

In a case "on all fours" with the present, it was held by this court that where the donor went into court and acknowledged a deed of gift for the purpose of registration and it was accordingly registered, that was a delivery, and that any subsequent declaration that it had not been delivered and was not to have effect did not invalidate it. *Airey v. Holmes*, 50 N. C., 142; *Ellington v. Currie*, 49 N. C., 21. These cases dispose of the defendant's exceptions to the exclusion of their proposed evidence.

Where the maker once parts with the possession or control of a deed he can not afterwards recall it, and the donee's acceptance is presumed, especially when it is beneficial to him.

Registration of a deed is only *prima facie* evidence of its execution, probate and delivery, and not conclusive; for otherwise no fraud or mistake could be corrected in either respect. The presumption arising from this *prima facie* evidence may be rebutted by sufficient evidence. To this effect is *Love v. Harbin*, 87 N. C., 249, and various other cases, including the text-books. In *Mitchell v. Ryan*, 3 Ohio State Reports, 377, it was held, first, that a

recorded deed is *prima facie* evidence of delivery, and it is to be presumed that the maker means to part with the title, and that clear proof ought to be required to warrant a court in holding otherwise; secondly, that where a grant is a pure, unqualified gift, the presumption of acceptance can be rebutted only by proof of dissent. . . . Affirmed.

Other cases holding that probate and registration are *prima facie* evidence of delivery are, *Wetherington v. Williams*, 134—276; *Frank v. Heiner*, 117—79; *Perkins v. Thompson*, 123—175; *Newlin v. Osborne*, 49—157; *Fortune v. Hunt*, 149—358; *Pentico v. Hays*, 88 Pac., 738, 9 L. R. A. (N. S.), 224.

Where F. executed a deed to K. to secure certain debts and delivered it to the attesting witness to have it registered, and the witness did so, though K. was absent, had no knowledge of the deed, and died soon afterwards, the deed was valid. *Myrover v. French*, 73—609. Under the circumstances in the cases of *Snider v. Lockenour*, 37—360, and *Redman v. Graham*, 80—231, the probate and registration was held to be conclusive on the grantor. But where the grantor signed and sealed the deed and acknowledged it for probate, and the grantee refused to accept it, delivery will not be presumed from subsequent registration. *Gaither v. Gibson*, 61—530.

Acknowledgment by husband and wife, with private examination of the wife, before a justice of the peace, is not presumptive evidence of delivery, but only preparation for delivery. *Tarleton v. Griggs*, 131—216. (See this case for discussion of delivery, with numerous cases cited, by Cook, J.)

3. EFFECT OF DELIVERY.

PHILLIPS v. HOUSTON,

Ante (44).

The grantor signed and sealed a deed and delivered it to the clerk for probate and registration, but before the probate was taken he changed his mind, took the deed from the clerk and placed it among his papers; after his death his executor destroyed the deed; the grantee knew nothing about the deed or its recall; the execution of the deed was complete and could not be revoked by the grantor. *Robbins v. Rascoe*, 120—79. (Clark J., dissents.) Defendant executed a deed by signing and probate, then exhibited it to the grantee and to B., from whom the grantee was to get the money, and said the deed was all right; B. let the grantee have the money and took a mortgage on the land; afterwards the grantor and grantee made an agreement, without the knowledge of B., to let one W. hold the deed until all of the purchase-money was paid; the execution of the deed was complete from the probate, and the parties were estopped to deny the validity of the mortgage. *Redman v. Graham*, 80—231.

An estate invested by deed can not be divested by redelivery of such deed to the grantor, even with the endorsement, "I transfer the within deed to W. again." *Linker v. Long*, 64—296. (This seems to have been after registration.) Before registration, the deed may be redelivered or surrendered and a new deed made, if there is no fraud and no other rights have intervened. *Perry v. Hackney*, 142—368; *Davis v. Inscow*, 84—396; *Hare v. Jernigan*, 76—471; *Respass v. Jones*, 102—5; *Austin v. King*, 91—286; *Ray v. Wilcoxon*, 107—514; but a married woman should reconvey. *Ibid.*; *Miller v. Church*, 112—626.

After delivery and before registration, if the deed is lost or destroyed, this does not restore the estate to the grantor. *Respass v. Jones*, 102—5; *Dugger v. McKesson*, 100—1; *Ellington v. Currie*, 40—21.

A deed was executed to the wife of A but not registered; A induced his wife to return the deed, and then had a new deed executed to himself. A purchaser from A without notice would hold against the heirs of the wife. *Crump v. Black*, 41—321. But a purchaser with notice would not be protected. *Tyson v. Tyson*, 37—137; *Tyson v. Harrington*, 41—329.

As to delivery of deed, see further *Mordecai's Law Lectures*, pp. 821-834; 2 *Page on Cont.*, secs. 577-597; 13 *Cyc.*, 526; 12 *L. R. A.*, 171, and notes; 9 *Am. & Eng. Encyc.*, 150.

The delivery of a policy of insurance is conclusive of the contract's being completed, in the absence of fraud, and is an acknowledgment that the premium was paid during good health. *Grier v. Life Ins. Co.*, 132—142. See also, *Kendrick v. Ins. Co.*, 124—317; *Gwaltney v. Assur. Co.*, 132—928; *Rayburn v. Casualty Co.*, 138—379; 141—431; *Hardy v. Ins. Co.*, 154—430; *Gardner v. Ins. Co.*, 163—367; *Britton v. Ins. Co.*, 165—149; *Murphy v. Ins. Co.*, 167—334; but the payment of the premium may be a condition precedent. *Perry v. Ins. Co.*, 150—143.

5. Attestation.

DEVEREUX v. McMAHON,

Ante (41).

A subscribing witness is not a necessary part of a deed. *State v. Gherkin*, 29—206; *Blackwell v. Lane*, 20—245.

The subscribing witness may attest the signing and sealing, and the delivery be shown by a third person. A deed was signed and sealed by the grantor but not delivered in the presence of the witness; it was afterwards delivered to the wife of the grantor for the benefit of the son, the grantee. It was held that the witness could prove the signing and sealing, which would be sufficient for probate, and the wife could prove the delivery, if the question was raised. *Gaskill v. King*, 34—211 (opinion by *Ruffin, C. J.*, and *Pearson, J.*, dissents); *Andrews v. Shaw*, 15—70; *Vines v. Brownrigg*, 15—265; *Whitman v. Shingleton*, 108—193; *Mordecai's Law Lectures*, 845.

6. Date.

The law presumes, nothing further appearing, that a deed was delivered when it bears date, though it is not essential to its validity that it should contain a date at all, but the presumption may be rebutted by evidence *aliunde*, in which case it becomes operative from the actual day of delivery. *Vaughan v. Parker*, 112—96; *Kendricks v. Dellinger*, 117—491; *Lyerly v. Wheeler*, 34—290; *Meadows v. Cozart*, 76—450; *Newlin v. Osborne*, 49—157; 2 *Blk.*, 304; *Goodson v. Whitfield*, 40—163; *Mordecai's Law Lectures*, 803. *Nichols v. Palmer*, 4—319; *Lake Erie R. R. v. Whitham*, 155 *Ill.*, 514; 40 *N. E.*, 1014, 46 *A. S. R.*, 302, 28 *L. R. A.*, 612; *Crabtree v. Crabtree*, 136 *Iowa*, 430, 113 *N. W.*, 923, 15 *Ann. Cas.*, 149.

7. Acceptance.

PARKER v. LATHAM,

Ante (45).

The deed being for the benefit of the grantee, his acceptance is presumed until the contrary is shown. *Kirk v. Turner*, 16—14; *McLean v. Nelson*, 46—396; *Green v. Kornegay*, 49—66; *Tate v. Tate*, 21—22; *Bank v. Pugh*, 8—198; *Lady Superior v. McNamara*, 3 *Barb' Ch.*, 375, 49 *A. D.*, 184; *Emmons v. Harding*, 162 *Ind.*, 154, 1 *Ann. Cas.*, 864.

Where a deed was made to A and B, and without B's knowledge was delivered to A, then B refused to accept it, the deed was not valid as to B, but what interest A took under it, *quere*. *Baxter v. Baxter*, 44—341. See also *Whichard v. Jordan*, 51—54; *Mordecai's Law Lectures*, 835.

8. Escrow.

(47) HALL v. HARRIS,

40 N. C., 303—1848.

PEARSON, J. When this case was before this court at June Term, 1844, it was decided that an execution does not bind equitable interests and rights of redemption from its *teste*, as in ordinary cases, but from the time of "execution sued;" and it was declared that the plaintiff would be entitled to a decree, provided the deed, under which he claimed, took effect before the execution, under which the defendant, Harris, claimed was issued. 3 *Ired. Eq.*, 289.

We are satisfied that the view then taken of the case was correct. The rights of the parties depend upon that single question.

The execution issued on the 7th of March, 1840. The plaintiff alleges that the deed took effect on the 2d of March, 1840. The facts are, that on the 2d of March the plaintiff and the defendant, Morgan, made an agreement, by which the plaintiff was to give Morgan \$725 for the land, to be paid, a part in cash, and the balance in notes and specific articles, as soon as the plaintiff was able, which he expected would be in a few days, and Morgan was to make a deed to the plaintiff, and hand it to Col. Hardy Morgan, to be by him handed to the plaintiff, when he paid the price. Accordingly on that day the plaintiff paid to Morgan a wagon and some leather, which was taken at the price of \$57.50, and Morgan signed and sealed the deed and handed it to Colonel Morgan to be handed to the plaintiff, when he paid the balance of the price. The deed was witnessed by Colonel Morgan and one Sanders, and is dated on the 2d of March. Afterwards, on the 10th of March, the plaintiff paid to Morgan the balance of the \$725, with the exception of \$152, for which Morgan accepted his note, and the deed was then handed to the plaintiff by Colonel Morgan.

The question upon these facts is, whether the deed takes effect from the 2d or from the 10th of March? We are of the opinion that it takes effect from the 2d, at which time, according to the agreement, it was signed, sealed and delivered to Colonel Morgan, to be delivered to the plaintiff, when he should pay the price. The effect of the agreement was to give the plaintiff the equitable estate in the land, and to give Morgan a right to the price. The purpose for which the deed was delivered to a third person, instead of being delivered directly to the plaintiff, was merely to secure

the payment of the price. When that was paid the plaintiff had a right to the deed. The purpose for which it was put into the hands of a third person, being accomplished, the plaintiff then held it in the same manner, as he would have held it if it had been delivered to him in the first instance. This was the intention, and we can see no good reason why the parties should not be allowed to effect their end in this way.

It is true, the plaintiff was not absolutely bound to pay the balance of the price. Perhaps he had it in his power to avail himself of the statute of frauds, and it would seem from the testimony, that, at one time, he contemplated doing so, on account of some doubt as to the title; but he complied with the condition and paid the price. His rights can not be affected by the fact, that he might have avoided it. If the vendor had died after the delivery to the third person and before the payment, the vendee upon making the payment, would have been entitled to the deed; and it must have taken effect from the first delivery; otherwise it could not take effect at all. The intention was that it should be the deed of the vendor from the time it was delivered to the third person, provided the condition was complied with. If this intention is *bona fide* and not a contrivance to interfere with the rights of creditors, of which there is no allegation in this case, it must be allowed to take effect.

A distinction is taken in the old books, between a case, when a paper, being signed and sealed, is handed to a third person, with these words: "take this paper and hand it to A. B. as *my deed*, upon condition," etc., and a case where these words are used, take "*this deed* and hand it to A. B. upon condition," etc. In the latter case it takes effect presently; while in the former it is held, in most cases, not to take effect until the second delivery. Touchstone, 58, 59.

The distinction, upon which this "diversity" is made, would seem too nice for practical purposes, to be a mere play upon words. The intention of the parties, whether one set of words be used or the other, is to make it a deed presently, but to lodge it in the hand of a third person, as the security for the performance of some act. If it was not to be a deed presently, provided the condition be afterwards performed, the maker would hold it himself, and the agency of the third person would be useless. Indeed, the idea that the third person is a mere agent to deliver the paper as a deed, if particular words be used, "escrow" for instance, even by the old cases, has many exceptions, and the deed is allowed, in such cases, to take effect. As if the maker dies, as in the case above put; or becomes *non compos mentis*; or, being a *feme sole*, marries; or if the vendor should create any encumbrance, as by

making a lease; in all such cases, when the paper was handed to the third person to be delivered as a deed upon condition, etc., it is allowed to take effect from the first delivery, in order to effectuate the intention of the parties. In other words, when it can make no difference, the deed takes effect from the second delivery, but if it does make a difference, then the deed takes effect from the first delivery. This entirely yields the question. The last exception cited above, as to the relation of the deed, in cases of "escrow" to avoid a lease, takes in the case under consideration; for it is the same, whether the encumbrance, to be avoided, proceeds from the act of the party, or from the effect of an execution, as the object is to make the deed effectual and to carry out the intention. *State v. Pool*, 27 N. C., 105.

But, in truth, the distinction can not be acted upon—it is merely verbal, and whether one set of words would be used, or the other, would be the result of mere accident. The law does not depend upon the accidental use of mere words "trusted to the slippery memory of witnesses." It depends upon the act, that a paper, *signed and sealed*, is put out of the possession of the maker. It must be confessed (and with reverence I say it), that many of the *dicta* to be found in the old books, in reference to deeds, are too "subtle and cunning" for practical use, and have either been passed over in silence, or wholly explained away.

We are satisfied from principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person to be handed to another upon condition, which is afterwards complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention that it should not then become a deed, and this intention would be defeated by treating it as a deed from that time, as, if, no fraud being suggested, the paper is handed to the third person, before the parties have concluded the bargain, and fixed upon the terms; which can not well be supposed ever to be the case, for, in ordinary transactions, the preparation of deeds of conveyance, which is attended with trouble and expense, usually comes *after* the *agreement* to sell.

There must be a decree for the plaintiff, with costs against the defendant, Harris.

A paper was given to the principal to be executed as a bond by himself and sureties, and it is next found in the hands of the obligee, signed and sealed by the parties; the sureties contend that it was an escrow and rely upon the fact that the name of one of the sureties appears in the body of the bond, and that he was to sign it and did not do so; the bond was valid because it could not be delivered to the obligee as an escrow, though it might have been so given to the principal. *Blume v. Bowman*, 24—338. When the surety signs under an agree-

ment with the principal that the bond is not to be binding nor delivered to the obligee until another signs it, the bond is valid, if the other person did not sign it and the principal delivered it to the obligee without notice of this condition. *Gwyn v. Patterson*, 72—189; otherwise, if the obligee knows of such condition. *Whitsell v. Mebane*, 64—345; *Pratt v. Chaffin*, 136—350.

An instrument signed, sealed and delivered by the grantor to the grantee is a deed and not an escrow, although they place it with a third person for safe-keeping until they both should call for it. *Gibson v. Partee*, 19—530; *Tolar v. Tolar*, 16—460. Where the grantor parts with a deed to anyone, there is a presumption that it was delivered as a deed and not as an escrow. *Tate v. Tate*, 21—22; *State v. Pool*, 27—105. But where the grantor gave the deed to the subscribing witness to be delivered to the grantee after the grantor's death, but also said, "if ever she wanted it, she would call for it," this was not sufficient delivery to constitute an escrow. *Roe v. Lovick*, 43—88.

In escrow the delivery is effective when the grantor relinquishes possession of the deed, and it passes title to the grantee when the condition is performed; it may relate back to the time of the original execution, if necessary to protect the rights of the parties. *Craddock v. Barnes*, 142—89; *Mordecai's Law Lectures*, 842; *Wellborn v. Weaver*, 17 Ga., 267, 63 A. D., 235; *Wipfler v. Wipfler*, 15 Mich., 18, 116 N. W., 544, 16 L. R. A. (N. S.), 941; *Fortune v. Hunt*, 149—358; *Binford v. Steele*, 161—660. If a deed is delivered in escrow and is wrongfully gotten by the grantee, it is invalid. *Bd. of Ed. v. Development Co.*, 159—162; whether an innocent purchaser from such grantee would get a good title, *quere*. *Hubbard v. Greely*, 84 Me., 340, 24 Atl., 799, 17 L. R. A., 511; *Guthrie v. Field*, 85 Kan., 62, 116 Pac., 217, 37 L. R. A. (N. S.), 330. For effect of escrow generally, see *May v. Emerson*, 52 Ore., 262, 16 Ann. Cas., 1132; *Riggs v. Trees*, 120 Ind., 402, 22 N. E., 254, 5 L. R. A., 696; *Darling v. Butler*, 45 Fed., 332, 10 L. R. A., 469; *Pomeroy v. Ins. Co.*, 86 Kan., 214, 38 L. R. A. (N. S.), 142; 16 Cyc., 561.

9. Registration.

Conveyances of land and certain other contracts are required to be registered in order to be valid against the claims of creditors or purchasers for value. Revisal, secs. 979, 980, 981. So with mortgages and deeds of trust. Revisal, sec. 982; conditional sales, sec. 983; marriage settlements, sec. 985; deeds of gift, sec. 986; powers of attorney, sec. 987; chattel mortgages, sec. 1039; mortgages of household and kitchen furniture, sec. 1041. Certified copy of registered instrument is sufficient evidence, sec. 988. Manner of probate, secs. 989-1030.

Failure to register a deed in time postpones the older deed to the claims of creditors and purchasers, but as against volunteers or donees the older deed, though unregistered, will as a rule prevail. *Tyner v. Barnes*, 142—110. A deed admitted to probate and ordered to be registered, may be registered at any time, and the certificates of probate and registration are sufficient evidence of execution and probate. *Sellers v. Sellers*, 98—13; but they are not conclusive evidence. *Love v. Harbin*, 87—249; *McKinnon v. McLean*, 19—p. 85. Registration upon an unauthorized probate is invalid. *Lance v. Tainter*, 137—249; *Williams v. Griffin*, 49—31; *Allen v. Burch*, 142—524.

In the absence of fraud, no notice however clear and direct will take the place of registration. *Quinnerly v. Quinnerly*, 114—145; *Tre-maine v. Williams*, 144—114; *Burwell v. Chapman*, 159—209; *Colonial Trust Co. v. Sterchie* (N. C.), 85 S. E., 40.

An unregistered deed may be introduced to show color of title. *Allen v. Burch*, 142—524; *Ray v. Wilcoxon*, 107—514; *Walker v. Col-traine*, 41—79; *Prince v. Sykes*, 8—87; but see *Janney v. Robbins*, 141—400; *Austin v. Staton*, 126—783; *Collins v. Davis*, 132—106; *Lindsay v. Beaman*, 128—189. This has been explained to apply where the parties

do not claim from a common grantor. *Gore v. McPherson*, 161—638; *Moore v. Johnson*, 162—266; 84 S. E., 1027, 168—621.

The certificate of the clerk is not necessary to the registration of a State grant, the Great Seal of the State being sufficient. *Ray v. Stewart*, 105—472; *Etheridge v. Ferreebee*, 31—312. It was not required to put on record the certificates of probate of a deed in recording it, though it was better to do so. *Love v. Harbin*, 87—249; but the certificate of the clerk includes an order to record the certificates. *Revisal*, sec. 999. For sufficiency of certificate of probate, see, *Cozad v. McAden*, 150—206; *Kleybolte v. Timber Co.*, 151—635; *Lumber Co. v. Branch*, 158—251; *Moore v. Quickle*, 159—129.

10. Bond as a negotiable instrument.

PARKER v. LATHAM,

Ante (45).

A sealed note payable to A. B. or bearer can pass only by a delivery to the obligee and an endorsement by him. *Marsh v. Brooks*, 33—409; *Gregory v. Dozier*, 51—4; *Bryan v. Enterprise*, 53—260; *Bland v. O'Hagan*, 64—471; *Parker v. Carson*, 64—563; *Spence v. Tapscot*, 93—246; but in *Weith v. Wilmington*, 68—24, it was held that this did not apply to corporation bonds payable to bearer.

Under the statute (*The Code*, sec. 41), a note under seal has all the qualities of a negotiable instrument, and the production of such paper with proof of the obligor's handwriting is sufficient evidence of delivery and ownership. *Pate v. Brown*, 85—166. It would still require endorsement to make it negotiable, and if assigned without endorsement, the holder would take it subject to all equities. *Spence v. Tapscot*, 93—246; *Loan Association v. Merritt*, 112—243; but when endorsed, it is like a note not under seal as to negotiability. *Miller v. Tharell*, 75—148; *Lewis v. Long*, 102—106; *Christian v. Parrott*, 114—215.

But under the Negotiable Instrument Law (*Revisal*, sec. 2155), the validity and negotiable character of an instrument are not affected by the fact that it is under seal.

11. Effect of a deed.

1. AS AN ESTOPPEL.

"A deed . . . is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be estopped by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed." 2 Blk., 295.

An estoppel operates entirely as to facts; its effect is to conclude the parties from making, and of course from proving, the facts to be different from what they are stated or acknowledged to be in the deed. *Taylor v. Shuford*, 11—116. The grantee is necessarily influenced in making the purchase by the quality and extent of the estate conveyed, and the grantor in good faith should be precluded from gainsaying it. *Weeks v. Wilkie*, 139—215.

Recitals in a deed are estoppels when they are of the essence of the contract, where unless the facts recited existed, the contract, it is presumed, would not have been made. *Brinegar v. Chaffin*, 14—108; *Fort v. Allen*, 110—183. Since the consideration is not a necessary part of

the deed, the recital of payment in the deed can be contradicted. *Barbee v. Barbee*, 108—582; *Smith v. Arthur*, 110—400; *Deaver v. Deaver*, 137—240; *Faust v. Faust*, 144—383. But in a policy of insurance the acknowledgment of the receipt of the premium estops the company from denying the validity of the policy for nonpayment; and the delivery of the policy, in the absence of fraud, is conclusive that the contract is complete. *Grier v. Life Ins. Co.*, 132—542; *Kendrick v. Life Ins. Co.*, 124—315.

A deed estops all persons claiming from or under the grantor, whether by deed or otherwise (parties and privies). *Murphy v. Barnett*, 6—351; *Gilliam v. Bird*, 30—280. A chattel mortgage registered proves itself, and estops the mortgagor to deny that he is responsible for the property. *State v. Griffith*, 126—377. A subsequent grantee is estopped to claim as against a prior deed from the same grantor. *Sinclair v. Huntly*, 131—243. A grantee who accepts a deed poll containing covenants or conditions to be performed by him as the consideration, is bound by these although he does not sign the deed. *Maynard v. Moore*, 76—158; *Long v. Swindell*, 77—176; *Fort v. Allen*, 110—183; *Chord v. Warren*, 122—75. The State is not bound by an estoppel nor is the grantee from the State estopped to deny what the State might assert. *Taylor v. Shuford*, 11—116; *Candler v. Lunsford*, 20—542. A person executing a deed in violation of a restraining order is estopped to deny its validity for that cause. *Wilson v. Land Co.*, 77—445. But a void deed is not an estoppel. *Miller v. Bumgardner*, 109—412.

For estoppel by deed in general, see 12 Am. & Eng. Encyc., 392 *et seq.*

2. AS A MERGER.

See this subject under Discharge of Contract, *post*.

On the subject of deeds in general, see Mordecai's Law Lectures, ch. 24; 19 Am. & Eng. Encyc., 107 *et seq.*; *Costner v. Fisher*, 104—392.

CHAPTER IV.

SIMPLE CONTRACTS. STATUTE OF FRAUDS.

"All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved." *Rann v. Hughes*, 7 T. R., 350, 6 E. R. C., 1.

"By the common law of England there were but few contracts necessary to be made in writing. Property lying in grant, as rights and future interests, and that sort of real property, to which the term incorporeal hereditament applies, must have been authenticated by deed. So the law remained until the stat., 32 H. VIII, which, permitting a partial disposition of land by will, required the will to be in writing; but estates in land might still be conveyed by a symbolical delivery in presence of the neighbors, without any written instrument; though it was thought prudent to add security to the transaction by the charter of feoffment. The statute of 29 Car. II, commonly called the Statute of Frauds, has made writing and signing essential in a great variety of cases wherein they were not so before, and has certainly increased the necessity of caution in the English courts, with respect to the admission of verbal testimony, to add to or alter written instruments, in cases coming within the provisions of that statute. That law being posterior to the charter under which this state was settled, has never had operation here; so that the common law remained unaltered until the year 1715, when a partial enactment was made of the provisions of the English statute." *Smith v. Williams*, 5 N. C., 426. But see *Odom v. Clark*, 146, p. 550.

The English Statute of Frauds, 29 Chas. II (1677), contained several sections, those particularly affecting contracts being sec. 4 and sec. 17.

Sec. 4. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; 2. Or whereby to charge the defendant upon any special promise to answer for the debt, default, or mis-carriage of another person; 3. Or to charge any person upon any agreement made upon consideration of marriage; 4. Or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; 5. Or upon any agreement that is not

to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Sec. 17. No contract for the sale of any goods, wares, or merchandise for the price of £10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

Sec. 1. Special promise of an executor or administrator to answer damages out of his own estate.

(48) SMITHWICK v. SHEPHERD,

49 N. C., 196—1856.

This was an action of *assumpsit*. The plaintiff had an account against the defendant's intestate for board for himself and workmen; in a conversation between the plaintiff, the defendant and a third person in regard to decedent's estate, the plaintiff produced his account; the third person said that defendant was the administrator and the man to pay it; defendant replied that he would see it paid, or it should be paid, and afterwards did pay \$30 on it. This action was brought against the defendant individually to recover the balance.

The plaintiff insisted, 1. That the promise of the defendant was substituted for the original debt; 2. That the defendant's having property applicable to the debt, and having promised to pay, or see it paid, was an *assumpsit* which discharged the original debtor, and on which plaintiff might rely; this, with the application of a credit thereto, was a consideration to support the promise.

A verdict was rendered for the plaintiff, subject to the opinion of the court as to whether the action could be sustained. The court, being of opinion with the defendant, ordered a nonsuit, and plaintiff appealed.

BATTLE, J. The declaration made by the defendant, that he would see the debt of his intestate paid, or that it should be paid, was, if a promise to pay at all, a special promise within the statute of frauds. Revised Stat., ch. 50, sec. 10 (Rev. Code, ch. 50, sec. 15). It was a promise either "to answer the debt of another person," or by an administrator, "to answer damages out of his own

estate," and, therefore, no action could be brought upon it; because it was not in writing and signed as the statute requires.

If the propositions contended for by the plaintiff were sustainable in this case, they would defeat the effect of the statute in every case, by making the promise operate as a substitute of itself, for the original debt. Such a doctrine can not, for a moment, be upheld.

The judgment of nonsuit was right, and must be affirmed.

(49) J. C. McLEAN, Admr., v. A. A. McLEAN and others,
88 N. C., 394—1883.

This was a civil action upon an administration bond, brought by the plaintiff as administrator *d. b. n.* of D. H. McLean, against the defendant, as administrator of G. W. McLean, and the sureties upon his bond. The breach of the bond, assigned as a cause of action, is the nonpayment of a judgment obtained in the Superior Court at Fall Term, 1875, against the defendant, which is as follows:

"It appearing by the complaint of the plaintiff that the defendant is justly due and indebted to the plaintiff in the sum of \$455.-61, and defendant having failed to answer, it is considered and adjudged by the court that the plaintiff do recover of the defendant, administrator of G. W. McLean, the sum of \$455.61," with interest and costs.

It was admitted by the plaintiff that this judgment was founded upon a note under seal, given by the defendant, A. A. McLean, to the plaintiff, in consideration of an open account due by the defendant's intestate to the plaintiff's intestate.

The court gave judgment in favor of the plaintiff and the defendants appealed.

ASHE, J. The plaintiff insisted the judgment was *de bonis testatoris*, and the defendants contend it was *de bonis propriis*, and this is the only question presented for determination.

We are not furnished with a copy of the note sued on, but we infer from the pleadings and admissions that it was a bond signed by the defendant, A. A. McLean, *as administrator*.

As a general proposition of law, an administrator can not make any contract to bind the estate of his intestate. If he gives his promissory note to pay a debt due by his intestate, it will be binding on him individually or not at all. If the note is founded upon sufficient consideration, as of assets applicable to the debt, or forbearance, he will be individually liable; but if there is no consideration, it will be *nudum pactum*. At the common law he was liable individually upon his *verbal* promise to pay, if there was a

sufficient consideration for the promise; and although the promise be in writing, it will be of no more effect since the statute of 29 Charles II, than before, unless it be by deed, or there be a good consideration for it. Williams on Executors, 1610.

It is well settled by the almost unvarying current of authorities, that the promissory note of an administrator or executor, founded upon the consideration of forbearance or the possession of assets, will be binding upon him in his individual capacity, although he should sign the note "as administrator or executor." Williams, *supra*; Parsons on Contracts, 128; Woods v. Ridley, 27 Miss.; Sims v. Stilwell, 3 How. (Miss.), 176; McGrath v. Bevers, 19 S. C., 328; Sleighter v. Harrington, 2 Mur., 332; Hall v. Craige, 65 N. C., 51; Kerchner v. McRae, 80 N. C., 219.

If the promissory note of an administrator, with a sufficient consideration to support it, will be binding upon him individually, *a fortiori* will his bond have that effect.

There is a marked distinction between a bond and a promissory note in reference to the liability of an administrator or executor. In the case of a promissory note, given for value received, it bears only *prima facie* evidence of consideration, and it is open to the defendant to go into the question of consideration and show, for instance, that he had no assets, at the time of making the note, applicable to the debt of the estate for which the note was given, or that there was in fact no consideration for the promise expressed therein. But a bond is a deed, signed, sealed and delivered. It is the act and deed of the party signing it, and it imports a valid consideration. It is against all principle to suppose that an administrator or executor could give such an instrument as would be binding upon the estate of his intestate or testator. Of course, then, where the engagement of the representative to pay a debt of a decedent is by bond, it is a compliance with the statute, but concludes the defendant from showing that there was no consideration.

Mr. Williams, in the passage above cited, recognizes the distinction. He says, though the promise be in writing, it is of no more effect since the statute than before, unless it be by deed, or there be a good consideration. Again, on page 1018, note 1, of his work, we find it laid down, that "a note given by an executor by way of submission to arbitration is not binding, unless there were assets in his hands. When the submission is made by bond, the executor is liable, not only because a seal imports a consideration (for a promissory note imports a consideration), but also because, when a person has executed an instrument under seal, he shall not be permitted to disprove the consideration. Both the bond and the note import assets, and of course a sufficient consideration: the consideration of the bond can not be explained; that of the note

may, as between the original parties and all parties having notice of the consideration." See the numerous cases there cited in support of these propositions.

In *Davis v. Mead*, 2 Ky., which was an action upon a bond given by the defendants as executors, the court says: "The plea of *plene administravit* can not avail them; the naming them executors was but descriptive of the persons, and the judgment was *de bonis propriis*." It is true that in that case some stress is laid upon the fact that the declaration was in the "*debet and detinet*," but it could not have been otherwise in an action upon such an instrument.

In *Hall v. Craige*, *supra*, which was an action upon a judgment confessed by the defendant and others, the court held that the judgment bound them in their individual capacity, though they styled themselves executors in making the confession.

In *Kerchner v. McRae*, *supra*, where the action was brought on a note under seal, executed by the defendants, as executors, to secure the amount of an account due and owing by their testator at the time of his death, it was held that the defendant was liable individually upon the bond, and the judgment was rendered against him in that capacity.

From these authorities our conclusion is, that the judgment in question was a judgment against A. A. McLean in his individual capacity, and the naming him "administrator" therein was mere surplusage; and consequently the defendants, W. A. Sellars and McKoy Sellars, are not liable as sureties on the administration bond of A. A. McLean, for the breach alleged in the complaint.

There is error. The judgment of the Superior Court is reversed, and the judgment of this court is that the said defendants go without day, and recover their costs.

Error.

Reversed.

Revisal, sec. 974. No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate, or to charge any defendant upon a special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Other cases in addition to those cited above, in which the liability is discussed, are *Williams v. Chaffin*, 13—333; *Tyson v. Walston*, 83—90; *Hailey v. Wheeler*, 49—159; *Beatty v. Gingles*, 53—302; *Kessler v. Hall*, 64—60; *Devane v. Royal*, 52—426; *Brandon v. Allison*, 66—532; *Norton v. Edwards*, 66—367; *Edwards v. Love*, 94—365; *Bellows v. Sowles*, 57 Vt., 164, 52 A. R., 118; *Dillaby v. Wilcox*, 60 Conn., 71, 25 A. S. R., 299, 13 L. R. A., 64; *Brown v. Quinton*, 86 Kan., 658, 122 Pac., 116; Ann. Cas., 1913 C., 396; 20 Cyc., 158; Statute of Frauds, Cent. Dig., secs. 7-12; Dec. Dig., ss. 7-12; Pollock Cont., 169.

In *Banking Co. v. Morehead*, 116—419, which was heard on demurrer, it was held that the executrix was personally liable and the estate was

not liable on a note given by the executrix in satisfaction of a debt of her testator. The case came up again in 122—318, when judgment had been rendered below against the defendant as executrix and not personally, and the court said it should have been rendered against her personally. And again in 124—622, the court refused to change the judgment on the ground of mistake, because the parties had executed the very instrument which they intended to execute. But in 116—413, which was an action on another note, the defendant was held not to be liable personally, because the note expressly limited the liability to her representative capacity. In rendering the opinion, Avery, J., says: "It would seem that the rule applicable to a personal representative, who signs in his fiduciary capacity, was founded upon a principle that can scarcely be said to have survived modern changes; but however it originated, it is a part of the law of this State repeatedly affirmed previously and last approved by us in a case between some of the same parties at this term." Whether the court intended to depart from this rule and adopt another in *Leroy v. Jacobosky*, 136—p. 450, does not clearly appear. See also, *Gavazza v. Plummer*, 53 Wash., 14, 101 Pac., 370, 42 L. R. A. (N. S.), 1.

Sec. 2. Special promise to answer for the debt, default or miscarriage of another.

(50) PEELE v. POWELL,

156 N. C., 553, 73 S. E., 234—1911.

This is an action brought by plaintiff against the defendant, admrx. of Edgar Powell, to recover \$286, for the value of goods sold and delivered to J. T. Cook, for which it is alleged the defendant's intestate is liable. Upon the evidence judgment of nonsuit was entered, and plaintiff appealed. Affirmed.

ALLEN, J. The liability of a promisor to answer, "upon a special promise, the debt, default, or miscarriage of another person" has been considered in numerous decisions of this court, and there is frequently much difficulty in determining whether a particular promise is within the statute. The term "special promise" means an express promise, and not one implied by law. *Browne Stat. Frauds*, sec. 166.

Whether oral or in writing, it must have a consideration to support it (*Draughan v. Bunting*, 31 N. C., 10; *Stanly v. Hendrix*, 35 N. C., 87; *Combs v. Harshaw*, 63 N. C., 198; *Haun v. Burrell*, 119 N. C., 547); but if in writing, the consideration need not appear in the writing, and may be shown by parol. *Nichols v. Bell*, 46 N. C., 32; *Haun v. Burrell*, 119 N. C., 547. If the promise is based on a consideration, and is an original obligation, it is valid, although not in writing. *Hospital Assn. v. Hobbs*, 153 N. C., 188.

The obligation is original if made at the time or before the debt is created and the credit is given solely to the promisor, as in *Morrison v. Baker*, 81 N. C., 80; *Sheppard v. Newton*, 139 N. C., 536, or if credit is given on the promises of both, as princi-

pals and as jointly liable, and not on the promise of one as the surety for the other. *Browne Stat. Frauds*, sec. 197; *Horne v. Bank*, 108 N. C., 119. So is a promise, made after the debt is created, when by reason of the promise the original debtor is released (*Sheppard v. Newton*, 139 N. C., 379; *Jenkins v. Holly*, 140 N. C., 379), and also if it is a promise to pay out of funds placed in the hands of the promisor by the debtor (*Stanly v. Hendrix*, 35 N. C., 86; *Threadgill v. McLendon*, 76 N. C., 24; *Mason v. Wilson*, 84 N. C., 53; *Voorhees v. Porter*, 134 N. C., 604), or if a promise based on a new consideration of benefit or harm passing between the promisor and the creditor. *Whitehurst v. Hyman*, 90 N. C., 489. If, however, there is a promise to pay out of a particular fund, and the fund is not received by the promisor, it is not binding. *Bagley v. Sasser*, 55 N. C., 350.

If one, under the former practice, was arrested in a civil action, and was released on the oral promise of another to pay the debt, the promise was binding because the release from arrest satisfied the original debt (*Cooper v. Chambers*, 15 N. C., 261; *Draughan v. Bunting*, 31 N. C., 10), but it was otherwise of an oral promise to pay upon condition that the creditor would not arrest the debtor, because the debtor remained liable. *Britton v. Thraikill*, 50 N. C., 331; *Rogers v. Rogers*, 51 N. C., 300; *Combs v. Harshaw*, 63 N. C., 198.

Where the promise is for the benefit of the promisor, and he has a personal, immediate and pecuniary benefit in the transaction, as in *Neal v. Bellamy*, 73 N. C., 384, and in *Dale v. Lumber Co.*, 152 N. C., 653, or where the promise to pay the debt of another is all or part of the consideration for property conveyed to the promisor, as in *Hockaday v. Parker*, 53 N. C., 17; *Little v. McCarter*, 89 N. C., 233; *Deaver v. Deaver*, 137 N. C., 242; *Satterfield v. Kindley*, 144 N. C., 455; or is a promise to make good notes transferred in payment of property, as in *Adcock v. Fleming*, 19 N. C., 225; *Ashford v. Robinson*, 30 N. C., 114, and in *Rowland v. Rorke*, 49 N. C., 337, the promise is valid although in parol.

If, however, the promise does not create an original obligation, and it is collateral, and is merely superadded to the promise of another to pay the debt, he remaining liable, the promisor is not liable, unless there is a writing; and this is true whether made at the time the debt is created or not. *Smithwick v. Shepherd*, 49 N. C., 197; *Bagley v. Sasser*, 55 N. C., 350; *Scott v. Bryan*, 73 N. C., 582; *Rowland v. Barnes*, 81 N. C., 239; *Haun v. Burrell*, 119 N. C., 547; *Garrett-Williams Co. v. Hamill*, 131 N. C., 59; *Sheppard v. Newton*, 139 N. C., 535, and *Supply Co. v. Finch*, 147 N. C., 106.

In our opinion, this case falls within the last class. There is no evidence of benefit to the intestate, and while the jury would have been justified in finding from the evidence that he promised to pay, it is not sufficient to sustain a finding that it was more than a promise to pay the debt of Cook, for which he (Cook) remained liable. . . .

The definition of a promise to answer for the debt of another, which is not enforceable, adopted in our court and applicable here, is: "An undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable." *Sheppard v. Newton, supra*. Tested by this rule, we think the action can not be maintained.

The account began on 22 February, 1906, and ended 27 March, 1907. The witness for the plaintiff, Bryant, testified that about the time of the last date (27 March, 1907), the plaintiff told him not to let Cook have any more goods without a written order from Powell, and that Cook had no credit at that time. The inference is that Cook had credit prior to that time, and no goods were afterwards sold to him. It is true that same witness also said that for all goods sold to Cook, credit was extended to Powell; and this would be entitled to great weight if he had stated something said or done by Powell authorizing the extension of credit. A similar statement was made by a witness in *Garrett-Williams Co. v. Hamill*, 131 N. C., 59, and was held insufficient to charge the promisor. Again he says, in July, 1906, he heard Powell tell the plaintiff to let Cook have goods, and he would see that they were paid for. He does not state whether or not any goods were sold to Cook at that time, and so far as we can see, the promise related to a single transaction, and there is no evidence that it is embraced in the account sued on. . . .

No error.

(51) DRAUGHAN v. BUNTING *et al.*

31 N. C., 10—1848.

This was an action of *assumpsit*, in which the plaintiff declared in several counts:

1. On a promise to indemnify the plaintiff on a note for \$600.
2. On a promise to indemnify the plaintiff on a note for \$479.-
43. . . .
4. To recover money paid on a judgment obtained on a note endorsed by the plaintiff, at the instance and request of the testator, John Sellars, as supplemental surety, and not as co-surety with said John Sellars on a note of David Underwood. . . .

The defendants pleaded the general issue and the statute of frauds. For the plaintiff it was proved that he endorsed a note for \$600, payable to the Bank of Cape Fear, in which David Underwood was principal and the defendant's testator, John Sellars, surety, which was renewed from time to time until the note for \$479.43 was given. It was further proved that a judgment was obtained on this note and the plaintiff was compelled to pay the sum of \$278.21, which he sought to recover of the defendants. The plaintiff then proved by Underwood, the principal in the note, that when he applied to the plaintiff to endorse for him, he declined doing so unless he could be indemnified, which he, Underwood, promised should be done; that thereupon John Sellars, the testator, in consideration that Underwood would convey to him a large number of slaves to secure him as his, Underwood's, surety in this and other debts, for which he, Sellars, was liable as his surety, promised to indemnify the plaintiff and save him from all loss in becoming endorser on Underwood's note; that Underwood did accordingly execute an absolute bill of sale to Sellars for a large number of slaves, and the plaintiff then endorsed the note for \$600, and that the negroes were afterwards sold by Sellars, and he acknowledged he had in his hands funds with which to discharge the debt for which the plaintiff was liable as endorser. The defendants objected to the competency of Underwood as a witness to prove these facts, which objection was sustained by the court. Whereupon the plaintiff executed to him a release, and the defendants pleaded it since the last continuance in bar of the action. A motion was then made by defendants' counsel, that the plaintiff should be nonsuited, both on the ground that they were discharged by the release, and also that the defendants' liability, if any, was for the debt, default or miscarriage of another and not for his own debt, and the plaintiff could not recover, because the promise was not in writing as required by the statute of frauds.

The court expressed an opinion that the action could not be sustained and the plaintiff submitted to nonsuit and appealed.

PEARSON, J. We concur with His Honor, that an action can not be maintained upon a parol promise of indemnity. That is void by the statute of frauds. Underwood was under a legal liability to indemnify the plaintiff as his surety, and the promise, superadded by the intestate, comes within the words and meaning of the statute: it is a promise to answer for the default of another, and there being a consideration makes no difference; it required no statute to make void a promise not founded upon a consideration.

The true test is, has the plaintiff a cause of action against another, to which the promise in question is superadded? If so,

the statute applies. But if there is no debt for which another is already or is about to become answerable to the plaintiff, or if the debt of the other is discharged and the promise in question is *substituted*, the statute does not apply; as when a creditor discharges a debtor, who is in custody, upon the promise of a third person to pay the debt, the original cause of action is gone by the effect of the discharge; the new promise is *substituted*.

We are of opinion that the effect of the release was misconceived. So far as there was a cause of action arising from the relation of co-suretyship under the Act of 1807, the release to the principal is a bar; for a surety, who seeks to recover from a co-surety a ratable part of money paid, must take care to do no act which will prevent the co-surety from having recourse against the principal; inasmuch as his right to contribution involves the duty of transferring to his co-surety a right to recover from the principal the amount which he is called upon to pay. If, therefore, he releases the principal, it is a discharge of the co-surety.

The case must be viewed as if no promise of indemnity had been made, for that is void by the statute; and as if no relation of co-suretyship had existed, for that is destroyed by the release.

There is, however, a fact in this case, to which the attention of the learned Judge seems not to have been called, which entitles the plaintiff to recover upon the count for money paid, and as the non-suit was submitted to, from the intimation of His Honor, that the plaintiff could not recover upon the facts stated, the judgment must be reversed.

The intestate received property from Underwood, sold it, and acknowledged that "he had in his hands funds to discharge the debt." As soon as the intestate received the money, the bank, although it had a cause of action on the note, had a new and distinct cause of action against the intestate, upon a promise implied by law upon the receipt of the money to pay the debt.

It is well settled that if A is indebted to B and puts money in the hands of C to pay B, B may sue C for money had and received. Chitty's Pleadings, vol. 1, p. 4, and the cases there cited.

The plaintiff, who was forced to pay the bank, can truly allege that he has paid money which the intestate was under legal liability to pay, in consequence of the receipt of the money, and this, according to the authorities, gives him the equitable action, as it is termed, for money paid to the use of the intestate. (Smith's Leading Cases, 1 vol., 55, note and cases cited.) It can not be objected that the plaintiff paid the money officiously, and falls under the rule, that no one can make another his debtor without his consent; for as his surety on the note he was liable to the bank, and

has been forced to pay a debt, which the intestate ought to have paid.

In *Hall v. Robinson*, 8 Ired., 56, a surety, having paid a part of the debt out of his own funds, was held to be entitled to recover of a co-surety the amount placed by the principal in the hands of the latter to be applied to the debt, for the reason that "having received it to pay the debt he could not in conscience and ought not in law to keep it;" he was, in fact, to that amount the *real debtor*. The cause of action did not arise out of the relation of co-suretyship and depend on the Act of 1807, for the principal having provided funds could not be said to be insolvent, nor was the action for a ratable proportion. That case, like the present, rested upon the broad principle, that the defendant having received money to pay a debt, which the plaintiff was afterwards forced to pay, was the *debtor* of the plaintiff.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

(52) WHITEHURST v. HYMAN,

90 N. C., 487—1884.

This was a civil action to recover from the defendant on a promise to pay certain debts of one Harrell, and the statute of frauds was relied upon as a defense. The facts appear sufficiently in the opinion. There was a judgment for the plaintiff, and defendant appealed.

MERRIMON, J. The material part of the statute relied upon by the defendant provides that, "No action shall be brought whereby to charge . . . any defendant upon a special promise to answer the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party charged therewith, or some other person thereunto by him lawfully authorized." The Code, sec. 1552.

It is settled by many judicial decisions in construing this statute, and others substantially like it, that where there is some new and original consideration of benefit or harm moving between the party to whom the debt to be paid is due, and the party making the promise to pay the same, such case is not within the statute; as where a promise to pay an existing debt is made in consideration of property placed by the debtor in the hands of the party promising, or where the party to whom the promise is made relinquishes a levy on the goods of the debtor for the benefit of the promisor, or where the party promising has a personal interest, benefit or advantage of his own to be subserved, without regard to the interests or advantage of the original debtor; as, for example,

if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person who has an interest in the same property promises the creditor to pay the debt in consideration of the creditor's relinquishing his lien. Such promises are not within the statute, because they are not made "to answer the debt, default, or miscarriage of another person."

It may be, the performance of the promise will have the effect of discharging the original debtor; but such discharge was not the inducement to, or the consideration to support the promise.

The moving, controlling purpose of the promisor in such case is his own advantage, not that of the debtor. It not unfrequently happens that in a great variety of business circumstances it becomes important in a valuable sense to third parties to discharge the debt of a debtor, or relieve his property from liability to the creditor for the benefit of such third parties, without regard to the benefit, ease or advantage of the debtor.

The advantage to the third party, the promisor, is a sufficient valuable consideration to support a contract separate from, and independent of, the debt to be discharged.

Draughan v. Bunting, 9 Ired., 10; *Stanly v. Hendricks*, 13 Ired., 86; *Threadgill v. McLendon*, 76 N. C., 24; *Mason v. Wilson*, 84 N. C., 51; 3 *Parsons on Cont.*, 24, 25 and note; *Alger v. Scoville*, 1 Gray, 391; *Fears v. Story*, 131 Mass., 47; *Williams v. Lepper*, 3 Bur. 1886; *Little v. McCarter*, 89 N. C., 233.

In this case the plaintiffs and others had judgments against one Harrell, and the plaintiff was pressing him by proceedings supplementary to the execution. The defendant claimed to own, was in possession of, and had deeds for real and personal property obtained from the debtor, Harrell; he was summoned to be examined in the supplementary proceedings against Harrell, and was about to be examined as to the character of his title, his indebtedness to Harrell, and what he might know about his property. Under such circumstances he promised the plaintiff and other judgment creditors that he would pay them fifty percent of their judgments against Harrell if they would discontinue the proceeding in which he was about to be so examined. The plaintiff and the other creditors accepted the promise, and discontinued the proceedings. There is nothing in the record tending to show that the purpose of the promise was for the benefit of Harrell, or that his advantage was considered at all.

It is manifest, as the case appears in the record, that the defendant did not "promise to answer the debt, default, or miscarriage" of Harrell in the sense of the statute. It plainly was not his purpose to do so. He claimed to be the owner of the property sought to be reached by the plaintiff; his title was about to be

scrutinized; he himself was about to be examined concerning it, and his indebtedness to Harrell. To avoid such scrutiny, to quiet his title for his own benefit and advantage, he promised to pay, without condition, fifty percent of the judgments referred to.

It appears that his purpose was to relieve himself and his property from embarrassment or question, to buy his peace, as he had a right to do, and he is bound to pay the price he agreed to pay for it. Such a consideration is valuable, and independent of the indebtedness of Harrell to the plaintiff. He got the advantage he bargained for, personal to himself without regard to Harrell, and he can not take shelter behind the statute. . . .

No error.

Application of the statute:

1. From the wording of the statute it applies to all kinds of obligations of the third person. *Combs v. Harshaw*, 63—189; *Pollock Cont.*, 169.

2. The promise to pay the debt must be in writing. *Bagley v. Sasser*, 55—350; *Rowland v. Barnes*, 81—234; *Scott v. Bryan*, 73—582; *Garrett-Williams Co. v. Hamill*, 131—57; *Britton v. Thraikill*, 50—104.

3. The liability of the third person must continue. If the cause of action is superadded to the original, the statute applies, but otherwise where the original debt is discharged. *Cooper v. Chambers*, 15—261; *Shaver v. Adams*, 32—13; *Hill v. Doughty*, 33—195; *Stanly v. Hendricks*, 35—86; *Rogers v. Rogers*, 51—300; *Styron v. Bell*, 53—222; *Hicks v. Critcher*, 61—353; *Combs v. Harshaw*, 63—198; *Horne v. Bank*, 108—109; *Haun v. Burrell*, 119—544; *Sheppard v. Newton*, 139—533; *Jenkins v. Holly*, 140—379; *Whitehurst v. Padgett*, 157—424; *Parker v. Daniels*, 159—518; *Farley v. Cleveland*, 4 Cowen, 432, 15 A. D., 387; *Mankin v. Jones*, 63 W. Va., 373, 60 S. E., 248, 15 L. R. A. (N. S.), 214; *Hurst Hdwr. Co. v. Goodman*, 68 W. Va., 462, 69 S. E., 898, 32 L. R. A. (N. S.), 598; 20 Cyc., 163.

4. It does not apply to a promise made to the debtor himself. *Little v. McCarter*, 89—233; *Deaver v. Deaver*, 137—240; *Haun v. Burrell*, 119—544; 25 L. R. A., 264, note. Where A sold a tract of land to B and gave a bond for title, and B promised orally to pay certain debts of A, this was not within the statute as to the debt of another, but was invalid as a contract for land. *Rice v. Carter*, 33—298; *Satterfield v. Kindley*, 144—455; *Barker v. Bucklin*, 2 Denio, 45, 43 A. D., 726; *Clark Cont.*, 69; *Pollock Cont.*, 170; 20 Cyc., 174.

5. It does not apply to a promise to pay out of property of debtor in the promisor's hands. *Mason v. Wilson*, 84—51; *Threadgill v. McLendon*, 76—24; *Voorhees v. Porter*, 134—591; 29 Am. & Eng. Encyc., 927; but where A purchased property belonging to an estate and promised the executor to pay certain debts of the estate the creditors could not sue A directly. *Styron v. Bell*, 53—222; *Hall v. Robinson*, 30—56; *Stimpson v. Fries*, 55—161; *Bagley v. Sasser*, 55—350; *Neal v. Bellamy*, 73—384; *Townsend v. Long*, 77 Pa. St., 143, 18 A. R., 438; *United Walnut Co. v. Courtney*, 96 Ark., 46, 130 S. W., 566, Ann. Cas., 1912 B, 443; 20 Cyc., 172.

6. A contract of guaranty comes within the statute; certainly in case of conditional guaranty, or guaranty of collection. *Carpenter v. Wall*, 20—144; *Supply Co. v. Finch*, 147—106; *Leonard v. Vredenburgh*, 8 Johns., 29, 5 A. D., 317; *Dow v. Swett*, 134 Mass., 140, 45 A. R., 310; *Frohardt Bros. v. Duff*, 156 Iowa, 144, 135 N. W., 609, 40 L. R. A. (N. S.), 242; *Child's Suretyship and Guaranty*, 83. If it is an absolute guaranty, or guaranty of payment, it is an independent promise; or if it is a promise to pay a man's own debt, as in the guaranty of a note

transferred for that purpose, it is not within the statute. *Adcock v. Fleming*, 19—225; *Ashford v. Robinson*, 30—114; *Marrow v. White*, 151—96; *Partin v. Prince*, 159—553; *Eagle Mowing Co. v. Shattuck*, 53 Wis., 455, 40 A. R., 780; *Swenson v. Stoltz*, 36 Wash., 318, 2 Ann. Cas., 504.

7. Whether a contract of indemnity is within the statute has been held in different ways. That it is within the statute, see *Draughan v. Bunting*, *supra*; *Martin v. McNeely*, 101—634; *Brown v. Adams*, 1 Stew. (Ala.), 51, 18 A. D., 36; *Nugent v. Wolfe*, 111 Pa. St., 471, 56 A. R., 291; *Hartley v. Sanford*, 66 N. J. L., 27, 55 L. R. A., 206; *Craft v. Lott*, 87 Miss., 590, 40 So., 426, 6 Ann. Cas., 670. That it is not within the statute, see *Jones v. Shorter*, 1 Ga., 294, 44 A. D., 649; *Anderson v. Spence*, 72 Ind., 315, 37 A. R., 162; *Smith v. Delaney*, 64 Conn., 264, 42 A. S. R., 181; *Rose v. Wallenberg*, 31 Ore., 269, 65 A. S. R., 826, 39 L. R. A., 378; *McCormick v. Boylan*, 83 Conn., 686, 78 Atl., 335, Ann. Cas., 1912 A., 882; *Alphin v. Lowman*, 115 Va., 441, 79 S. E., 1029, Ann. Cas., 1915 A., 863; 16 A. & E. Enc., 169; 2 Page Con., sec. 634; *Clark Cont.*, 70.

8. The statute does not apply where the promise is in effect to pay promisor's own debt, or to protect his right in certain property. *Hockaday v. Parker*, 53—16; *Deaver v. Deaver*, 137—240; *Harriman Cont.*, secs. 578, 579, 581; *Satterfield v. Kindley*, 144—455, 15 L. R. A. (N. S.), 399; *Hospital v. Hobbs*, 153—188; *Rogers v. Lumber Co.*, 154—108; *Whitehurst v. Padgett*, 157—424; *Frohardt Bros. v. Duff*, 156 Iowa, 144, 135 N. W., 609, 40 L. R. A. (N. S.), 242; *Nelson v. Boynton*, 3 Metc., 396, 37 A. D., 148; 20 Cyc., 167, 188.

9. The statute does not apply when credit is given to the promisor alone, or to him and the third person jointly as principals, but it does apply when his obligation is in any way collateral. *Peele v. Powell*, *supra*, and cases cited; *Whitehurst v. Padgett*, 157—424; *Davis v. Patrick*, 141 U. S., 479; *Sherman v. Alberts*, 153 Mich., 361, 116 N. W., 1090, 136 A. S. R., 486; *Johnson v. Bank*, 60 W. Va., 320, 55 S. E., 394, 9 Ann. Cas., 893; 20 Cyc., 180, 184.

10. There must be a real liability. The promise to pay an invalid debt of another is not binding; as the promise to pay the debt of a married woman which is void. But where it is only voidable, as in case of an infant, the promise is binding. *Scott v. Bryan*, 73—582; *Dexter v. Blanchard*, 11 Allen, 365; *King v. Summett*, 73 Ind., 312, 38 A. R., 144; *Brown v. F. & M. Nat. Bank*, 88 Tex., 265, 33 L. R. A., 359; 20 Cyc., 162.

11. A consideration is necessary. If the promise is made at the same time as the original promise, the original consideration is sufficient; if made afterwards, there must be an additional consideration. *Peele v. Powell*, *supra*; *Craig v. Stewart*, 163—531; *Farley v. Cleveland*, 4 Cowen, 432, 15 A. D., 387.

12. By Lord Tenterden's Act, 9 Geo. IV, a writing is required to bind a person for any representation relating to the credit of another person, to enable him to obtain goods, etc. This has been adopted in several States, but is not in force in N. C. *Walker v. Russell*, 186 Mass., 69, 71 N. E., 86, 1 Ann. Cas., 688; *Knight v. Rawlings*, 205 Mo., 412, 104 S. W., 38, 13 L. R. A. (N. S.), 212, 12 Ann. Cas., 325.

Sec. 3. Contracts to sell or convey lands, or any interest therein.

1. Any interest in land.

(53) HOLMES v. HOLMES,

86 N. C., 205—1882.

In 1851 the land in controversy was conveyed to a trustee to be held in trust for the plaintiff; in 1858 the trustee conveyed the land to one Worth, and the plaintiff consented orally to the sale. This was an action for the land. There was judgment for the plaintiff and defendant appealed. Affirmed.

RUFFIN, J. . . . The position assumed for the defense is that the plaintiff, in consideration of the emancipation of a slave, her sister, had parted with her trust estate; and this it is insisted she could do by parol, for that, as a trust estate may be created by parol, so may one be disposed of in that manner. We were furnished with no authorities in support of this position, and so far as our researches have gone, they are all against it. In *Maxwell v. Wallace*, Busb. Eq., 251, a contract for the sale of an equitable interest in land was held to be within the statute of frauds, and void unless in writing; and so too in *Simms v. Killian*, 12 Ired., 252, and *Rice v. Carter*, 11 Ired., 298. In fact, all the authorities, whether taken from the text-writers or from adjudged cases, concur in saying that wherever anything is done, which substantially amounts to a transfer, or parting with an interest, whether legal or equitable, in lands, the contract is for the sale of "an interest in or concerning lands," and comes within the statute. The distinction which obtains between such a transfer and an original declaration of a trust is clearly pointed out by PEARSON, C. J., in *Shelton v. Shelton*, 5 Jones Eq., 292, and by the present Chief Justice in *Shields v. Whitaker*, 82 N. C., 516. . . .

No error.

(54) McCRACKEN v. McCRACKEN,

88 N. C., 272—1883.

This was a civil action in which the facts were as follows:

In his complaint as originally drawn and first amended, the plaintiff alleged that in 1872 the defendant was the owner of a tract of land in Haywood County, whereon was a valuable mill site and convenient waterpower, which he was anxious to have improved; that the parties made a parol agreement to the effect that

the plaintiff should erect a mill upon the premises and dig a race, and in consideration of his so doing the defendant should convey to him the said mill seat, the race privilege, and a sufficient lot of ground for a logway about the sawmill; that in pursuance of said agreement the plaintiff erected a grist mill and sawmill at the place, dug the race, and continued to use the same up to 1879, when defendant gave him written notice to remove his mills and quit the place; that the plaintiff had thus sustained a loss of \$1,000; that the defendant should be required to convey the property to the plaintiff, or pay the loss sustained.

The defendant denied that there was any agreement in regard to the land, but that the plaintiff entered upon the land and built the mill without authority and without any understanding as to the title; that after using it for several years, without paying any rent, the plaintiff offered to buy the land for the sum of \$50, which defendant declined as not being enough, and that this was the only proposition that ever passed between them in regard to a purchase; finding that the race and flow of water damaged the land, he notified the defendant to remove his mill and machinery from the premises, and he now asks the court to require him to remove them; he also alleges that he has been damaged to the amount of \$1,000.

The plaintiff offered evidence to show the parol agreement as alleged, and also that defendant had given him license to enter and occupy the premises and thereby induced him to make the expenditure alleged. The defendant objected to this evidence, but it was admitted by the court, not to show a parol contract to convey land, but to show a license, and allowed the plaintiff to amend his complaint so as to allege this view of the case.

Upon the issues submitted the jury found that the improvements were put on the land with the knowledge and permission of the defendant; that the defendant notified the plaintiff to quit the premises and plaintiff did so; that the value of the improvements was \$150. From a judgment for the plaintiff, the defendant appealed.

RUFFIN, J. In consideration of the decisions made in *Chambers v. Massey*, 7 Ired. Eq., 286; *Dunn v. Moore*, 3 Ired. Eq., 364, and *Sain v. Dulin*, 6 Jones's Eq., 95, it may well be doubted whether the court can grant any relief, even so far as to give the purchaser compensation for his improvements, under a parol contract for the purchase of land, the terms of which are denied or disputed by the defendant in his answer. These cases all go to the length of saying, that if, in an action brought to enforce the specific performance of such a contract, or in the alternative for compensation for improvements put upon the land, the answer

should deny that there was any contract, or allege that its terms differed from those set out in the complaint, then the court could grant neither relief, because the statute forbids its going into proof to establish for any purpose whatsoever, a contract variant from the one admitted in the answer; and if upon that the plaintiff could get no relief, he could not get it at all.

These cases seem to have been well considered, and much pains taken in them to make known their reasons and to show wherein they differed from other decisions (and it is not to be denied that there are others) which seemed to be opposed to them. It would, therefore, require a most convincing argument to induce me, speaking for myself alone, to depart from principles so maturely considered and so clearly enunciated, and especially as they seem to be in strict keeping with the wise policy of the statute of frauds, in that they close the door upon temptations to commit perjuries, and the assertion of feigned titles to property. It is not necessary, however, that we should now go to the full length of those decisions, as we conceive a much less stringent rule, and one sanctioned by all the authorities, is sufficient to preclude this plaintiff from the recovery he is seeking to make.

In *Albea v. Griffin*, 2 Dev. & Bat. Eq., 9, which is so often referred to as the leading case on the subject, the right of a purchaser under a parol contract to have compensation for improvements, made under an honest expectation that the land would be his, was put expressly upon the ground that it would be against conscience to allow the owner under such circumstances to acquire and enjoy the fruits of another's labor, or the expenditure of another's money, and thus enrich himself to the injury of that other. But neither in that case nor in any other in which its principles have been adopted—and there are many such—is there even a suggestion to be found, that an action can be sustained in any form, or in any court, whether at law or in equity, for damages for the nonperformance of such a contract; and that is simply what this action is, nothing more nor less. To permit it to be done, would be for the courts to act in the very teeth of the statute, in defiance of the declared will of the Legislature.

Wherein could consist the difference between a direct enforcement of the contract, in such case, and the court's saying to the owner, we can not compel you to part with your property, but should you undertake to exercise ownership over it, we will mulct you with damages? The most they can do, and all they have ever undertaken to do, is to say to him that if he repudiates the contract he must be content with taking back what was his own, and at its own intrinsic value, unenhanced at the cost or by the labor of another.

But what sort of connection is there between that principle and this case, in which the defendant is not only content with being restored to what was his own, but invites the plaintiff to take what is his (buildings, machinery and all), and craves the aid of the court in compelling him to do so?

If we consider the contract as a license given to the plaintiff to enter upon the land, and erect and enjoy the improvements, we can not perceive that it in the least serves to help his case. If purely a license, it excused, it is true, his entry upon the land which would otherwise have been a trespass; but it was still revocable, and its continuance entirely dependent upon the will of the owner. If intended to pass a more permanent and continuing right in the land, whereby the authority or estate of the owner could be in the least impaired, it was then not only necessary to be evidenced by writing, but could only be made effectual by *deed*. In Hilliard on Vendors, 124, it is said that a license which grants an estate, however short, requires a deed; and in 3 Kent, 352, the doctrine is thus stated: "A claim for an easement must be founded upon a grant or upon a presumption which supposes one, for it is a permanent interest in another's land, with a right to enter and enjoy the same;" and to the same effect are the decisions in this court in *Bridgers v. Purcell*, 1 Dev. & Bat., 492, and *Carter v. Page*, 4 Ired., 424. In any point of view that can be taken of the case, this court thinks the plaintiff must fail in his action.

Having made a contract such as the law discourages from considerations of public convenience, he must abide the consequences; and as the defendant disclaims a purpose to appropriate what is his (the plaintiff's), he must be content with getting that back without compensation for any loss he may have sustained.

The judgment of the court below is, therefore, declared to be erroneous, and the same is reversed, and judgment will be entered here that the defendant will go without day.

SMITH, C. J., files a dissenting opinion, in which he concurs in the disposition of the appeal, but does not agree with the court in the argument upon which it is based, citing and discussing numerous cases.

Revisal, sec. 976. All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them; and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands, exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

Revisal, sec. 980. No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any prop-

erty as against creditors and purchasers for value, but from registration in the county where the land lies.

In addition to the cases given above and the cases therein cited, the following constructions of the statute have been made:

The statute applies—

To all contracts to sell or convey any interest in land, including legal and equitable interests. While certain equitable interests may arise without writing, as in parol trusts, yet when they do exist, they must be transferred in writing. *Perkins v. Presnell*, 100—220; *Dover v. Rhea*, 108—88; *Kelly v. McNeill*, 118—349; *Holmes v. Holmes*, 86—205; *Maxwell v. Wallace*, 45—251; *Rice v. Carter*, 33—298; *Wilkie v. Womble*, 90—254; *Harper v. Spainhour*, 64—629; *Henderson v. Henrie*, 68 W. Va., 562, 71 S. E., 172, 34 L. R. A. (N. S.), 629; *Morgart v. Smouse*, 103 Md., 463, 63 Atl., 1070, 7 Ann. Cas., 1140; 22 A. & E. Enc., 27; 20 Cyc., 221, 230.

A parol agreement between husband and wife that the proceeds of the sale of the wife's land should be invested in other lands for her, is within the statute, but she is entitled to such proceeds and may charge the land so purchased. *Cade v. Davis*, 96—139. An expectancy, as in case of the heir while the ancestor is living, is such an interest as requires a writing. *Vick v. Vick*, 126—123; *Tucker v. Markland*, 101—422. A parol partition, or a parol agreement for partition, is void under the statute. *Fort v. Allen*, 110—183; *Camp Mfg. Co. v. Liverman*, 124—7; *Rhea v. Craig*, 141—602; *McPherson v. Seguin*, 14—153; *Anders v. Anders*, 14—529; *Medlin v. Steele*, 75—154; but in some states such partition, when the parties have taken possession of their respective shares, is sustained either under the doctrine of part performance or upon the theory that the partition is not an acquisition, purchase or transfer of an interest. *Taylor v. Millard*, 118 N. Y., 244, 23 N. E., 376, 6 L. R. A., 667; *Tomlin v. Hilyard*, 43 Ill., 300, 92 A. D., 118. An easement is such an interest as must be contracted for in writing and conveyed by deed. *R. R. v. Battle*, 66—540; *Kennedy v. Williams*, 87—6; *Spawn v. S. D. R. R.*, 26 S. D., 1, 127 N. W., 648, Ann. Cas., 1912 D, 979; *Yeager v. Tuning*, 79 Ohio St., 121, 86 N. E., 657, 19 L. R. A. (N. S.), 700.

A parol agreement by C to execute a covenant to convey land to D is void under the statute. *Ledford v. Ferrell*, 34—285. A particular estate of freehold, as dower, can not be surrendered to the remainderman by parol agreement. *Houston v. Smith*, 88—312. Submission to arbitration and the award must be in writing, when the controversy involves land. *Crissman v. Crissman*, 27—498; *Pearsall v. Mayer*, 64—549; *Fort v. Allen*, 110—183; *Walden v. McKinnon*, 47 So., 874, 22 L. R. A. (N. S.), 716. Location of boundary lines can not be changed by parol agreement, unless it relates to the running and marking at the time the deed was made. *Shaffer v. Hahn*, 111—1; *Buckner v. Anderson*, 111—572; *Carraway v. Chancy*, 51—361; *Presnell v. Garrison*, 122—595; *Turner v. Baker*, 64 Mo., 218, 27 A. R., 226; *Lewis v. Ogram*, 149 Cal., 505, 87 Pac., 60, 10 L. R. A. (N. S.), 610; *Payne v. McBride*, 96 Ark., 168, 131 S. W., 463, Ann. Cas., 1912 B, 661. Where there is a valid contract between A and B for land, C can not be substituted for either by parol. *Love v. Cobb*, 63—324; *Flinner v. McAvoy*, 37 Mont., 306, 96 Pac., 340, 19 L. R. A. (N. S.), 879, 15 Ann. Cas., 1175. Where A conveys land to B with a parol agreement that B is to reconvey the whole or a part to him, no equitable element being involved, such agreement is void. *Campbell v. Campbell*, 55—365. So where A buys land at execution sale under a parol agreement that B may afterwards have it at the price bid with interest. *McKee v. Vail*, 79—194. But where in such contract there is an equitable element growing out of a trust, fraud, relation of the parties, etc., it will be enforced. *Blount v. Carraway*, 67—396; *Cohen v. Chapman*, 62—92; *Vannoy v. Martin*, 41—169; *Neely v. Torian*, 21—410; *Allen v. Caylor*, 120 Ala., 251, 74 A. S. R., 31.

An exchange of lands is within the statute. *Barnes v. Teague*, 54—277, 62 A. D., 200; *Gordon v. Simmons*, 136 Ky., 273, 124 S. W., 306,

Ann. Cas., 1912 A, 305. As to party walls, division fences, etc., there is a division of opinion, but it seems that generally these do not come within the statute. Walker v. McAfee, 82 Kan., 182, 107 Pac., 637, 27 L. R. A. (N. S.), 226; Meyers v. Perkins, 89 Neb., 59, 130 N. W., 986, Ann. Cas., 1912 C, 468.

Fixtures, as a cotton gin and press so attached to the land as to become a part of the freehold, can not be excepted by parol, when the land is sold and deed executed. Bond v. Coke, 71—97; but when buildings are sold without the land and intended to be separated, they may be removed as personalty. Cowell v. Ins. Co., 126—684.

Leases for more than three years, and all mining leases, and all contracts for such terms, must be in writing. Briles v. Pace, 35—279; Krider v. Ramsay, 79—354; Jordan v. Furnace Co., 126—243; Wade v. Newbern, 77—469. But in most States all leases for more than one year must be in writing. Childers v. Lee, 5 N. M., 576, 25 Pac., 781, 12 L. R. A., 67; Wallace v. Scoggins, 18 Ore., 502, 17 A. S. R., 749.

2. Growing trees.

(55) MIZELL v. BURNETT,

49 N. C., 249, 69 A. D., 744—1857.

Action of *assumpsit*. The defendant was the owner of a tract of land on Roanoke River, on which there was a large number of white-oak trees, suitable for making staves. The plaintiff, wishing to purchase the timber, went to examine it, and then went to see the defendant at Williamston, Martin County, about February 1, 1853. On February 14, 1853, the defendant wrote to Mr. Webb, cashier of the bank at Windsor, about seven miles from the residence of the plaintiff:

“Sir: I sold Solomon Mizell, Jr., some oak timber, amount \$800. I was to take such names to the notes enclosed as you would write me were good for the amount. I also send a letter over to Solomon Mizell, Jr.; please give it to him (to-day) if he is in town.”

In the letter to Mr. Webb was enclosed a letter of the same date, directed to the plaintiff:

“Sir: I received your letter of the 10th inst., and would say in reply, you can have my oak timber on the tract of land, known as the Walling tract, on Roanoke River, as per agreement when you were here, for \$800, in two notes, 12 and 18 months from date, with interest from date, with such security as L. S. Webb says is sufficient for the amount. I am unable to get over, but you may consider it a trade, you complying with the above. You can get your notes fixed as above stated; show them to L. S. Webb, and get a letter from him, to me, stating that the security is sufficient, and all will be right; then I will give you a right to the timber as per agreement.” (Signed by defendant.)

“P. S.—I have enclosed the two notes to L. S. Webb for you to fill up. J. H. B.

"I will be at home Saturday next, or any day this week, or you can write me what day you will come, and I will be here. J. H. B."

This letter, with the two notes, were delivered to the plaintiff in a day or two, and he remarked that he and the defendant had made the trade as stated in the letters, and that he would have the notes signed, and return with them a letter from Mr. Webb, or go over and deliver the notes to defendant.

On the 19th of February, one Wynn offered the defendant \$1,000 for the timber in question. And on the 22d of February the defendant wrote to Mr. Webb as follows:

"Sir: I enclosed two notes for Mr. Mizell to sign, and directed him to let me hear from him. Not hearing from him, or seeing him, I promised it to another man, presuming, from his conduct, that he has abandoned the trade. The other man has been waiting for some time, and has been urging me to say what I will do with him. I put him off for some time, until Mizell could come or write, and he has not done either." (Signed by defendant.)

This letter was received the day it was written, and about twelve days afterward the plaintiff called on Mr. Webb, with the notes signed, and the latter gave him a letter to the defendant, stating that the notes were good beyond doubt. Mr. Webb, at the same time, notified the plaintiff of the contents of the letter of February 22, not having seen him sooner. The plaintiff gave as his reason for not coming sooner with the notes that his wife had been very sick, and there had been a freshet which prevented his getting over to Williamston. The plaintiff then went to see the defendant, about twenty-five miles away, and presented the letter, and the notes. The defendant kept the letter, returned the notes, and refused to make title to the timber.

The defendant resisted the plaintiff's recovery on the following grounds:

1. That the evidence showed only a proposition on the part of defendant to sell, but no acceptance of the terms before the sale to Wynn.

2. That the defendant had the right, at any time, to withdraw his proposition before its acceptance by the plaintiff, and in his second letter to Mr. Webb had done so.

3. The defendant did not tender the notes in a reasonable time.

4. The contract was not written so as to comply with the statute of frauds.

There was a verdict and judgment for the plaintiff for \$200, and defendant appealed.

PEARSON, J. It was properly conceded that a contract to sell "growing trees" is within the statute of frauds, being a contract to sell "land or some interest in, or concerning the same."

We are of opinion with His Honor, that to make a contract to sell growing trees binding on the vendor, it is sufficient that the contract be signed by him, and it is not necessary that it should also be signed by the vendee. The statute provides that the contract shall be signed by the "party to be charged therewith." This answers the purpose, which is to exclude perjury in an action to enforce the contract. In reference to the other party the statute is silent, and there is consequently nothing to justify the construction, that he is also required to sign. If the purchaser of land pays the price in cash, taking a bond for title, there is no reason why he should put his name to the contract. So, if he gives a note for the price, that is sufficient, although the note makes no reference to the contract. So, if the vendor binds himself in writing, and is content to take the verbal promise of the purchaser to pay the price, it is his own fault, and he must blame himself for the folly of getting into a situation where he is bound, but the other party can not be charged if he chooses to insist upon the statute. Common justice, and the general principles of law, require that there shall be a mutuality in contracts; that is, if one party is bound the other ought to be. But there may be exceptions. Although it is a maxim that a contract is never binding unless there be a consideration, yet there is a distinction between a consideration and the mutuality of contracts in reference to the obligation thereof, and the fact that by some other principle of law, or the provisions of a statute, one party has it in his power to avoid the obligation, although it suggests a very forcible reason for not entering into a one-sided contract, does not necessarily have the effect of making such contract void as to both parties. One agrees to deliver, at a future day, a certain article to an infant, in consideration of his promise to pay the price, the contract is not void, although the infant may avoid the obligation on his part, if he chooses to protect himself on the ground of infancy. So, if one agrees in writing to convey land in consideration of a verbal promise of the other party to pay the price, the contract is binding on the vendor, although the vendee may avoid the obligation on his part if he chooses to protect himself under the provisions of the statute. It is not considered, in either case, that the contract is *nudum pactum* and void for the want of consideration. This is the result of the English decisions in reference to the statute of frauds, and although our statute is not precisely in the same words, yet the substance is the same, the purpose is the same, and the difference in the wording is not such as to justify a difference in construction. *Laythoarp v. Bryant*, 2 Bing. N. C., 744 (29 Eng. Com. L. Rep., 469) ; *Allen v. Bennett*, 3 Taunt. Rep., 170.

We also agree with His Honor, that the letter of the defendant

to the plaintiff, dated February 14, 1853, is a sufficient writing, or memorandum of the contract to bind the defendant and subject him to an action for a breach, provided there be no other difficulty in the way of the plaintiff. The writing is required only as *evidence* of the contract and not to constitute it. This is well settled both in law and equity; Jackson v. Lowe, 1 Bing., 9; Bateman v. Phillips, 15 East., 172; Laythoarp v. Bryant, *supra*, 3 Atk., 503, 1 Vern., 110. According to the view we take of the case, it is not necessary to decide whether the letter of the 14th of February, above referred to, is only a proposition to sell, or contains in itself the contract, or is evidence of a contract previously made; for in either view the plaintiff was required to execute the two notes with approved security, and the only question is, whether he did execute and tender them to the defendant in time to perfect his right of action.

If the plaintiff had tendered the notes on the Saturday referred to, or any day during that week, it is clear that the defendant would have been bound. There is strong ground to support the position, that according to the proper construction of the letter, the plaintiff was required to deliver the two notes during the week, or at all events, to *write* during the week, and fix on a day—the purpose being not to let the matter stand open and leave him unbound longer than that week. It would seem the defendant wrote this letter reciting the agreement or purpose to bind himself in writing, with the expectation that the plaintiff was also to bind himself during that week. But we put our decision on a broader ground. The plaintiff was certainly required to deliver the notes within a reasonable time, and we think a delay of twenty days was, under the circumstances, unreasonable, and consequently the plaintiff did not, by his tender of the notes, acquire a right of action.

What is a reasonable time must, in all cases, depend upon the circumstances. The nature of the transaction may make a delay unreasonable, which, in a transaction of a different kind would not be so. According to the law merchant, notice of the dishonor of a bill must be by the return mail, for “promptness is the life of trade.” So, if one offers to take one hundred dollars for his horse, the proposition must be accepted *at the time*; for nothing else appearing, his object is to sell at that time. So, the question may depend upon the condition of the parties. If one is bound, and the other is *foot-loose*, the time must be short, for it would be unreasonable to keep the parties in so unequal a condition for a long time. This is our case. The defendant was bound in writing, the plaintiff was *foot-loose*. If a storm had destroyed the trees, he was not bound to complete the trade, even after his conversa-

tion with Webb, and it was unreasonable to delay twenty days, and then seek to get the advantage of an appreciation in the value of the timber, or of the fact, that it was worth more by some \$200, at the time of the contract, than the owner supposed.

This delay was the more unreasonable, because the defendant earnestly insisted that the business should be closed on the next Saturday, or some day during that week, which ought to have quickened the plaintiff's diligence.

The suggestion that the delay was occasioned by the sickness of the plaintiff's wife, and the freshet in the river, will not avail. Assuming that she was sick, it does not appear how that made it *impossible* for him to procure the notes. As to the river being up, that did not prevent the defendant's letter of the 22d from reaching its destination, and the plaintiff could have crossed in the same way. Nor did it prevent him from crossing to make the tender. It is true, he went a round-about way, but his being able to do so repels the idea of an impossibility.

But in the second place, it is familiar learning that a right, depending upon a condition precedent, does not accrue unless the condition be performed, although performance becomes impossible by the act of God. There is a diversity between a condition subsequent by which an estate is to be defeated, and a condition precedent by which an estate is to be created, or a right is to accrue. Co. Litt. "Conditions."

The defendant agreed to convey the timber to the plaintiff, provided he executed the notes in a reasonable time. The principle is the same as if the condition had been to execute the notes in ten days. Performance is necessary to give a right of action.

Per Curiam. There is error. Judgment reversed, and a *venire de novo*.

Growing trees, *fructus naturales*, are a part of the realty. *Moring v. Ward*, 50—272; *Dunkart v. Rinehart*, 89—354; *Carpenter v. Medford*, 99—495; *Mizzell v. Ruffin*, 118—69; *Drake v. Howell*, 133—162; *Hawkins v. Lumber Co.*, 139—160; *Lumber Co. v. Corey*, 140—462; *Tremaine v. Williams*, 144—114. The distinction made in some courts, that if the contract is made in immediate contemplation of severance of the timber the statute does not apply, is not recognized in this State. *Ives v. R. R.*, 142—131; *Midyette v. Grubbs*, 145—85. (See *Clark on Cont.*, 76 and note; 28 *Am. & Eng. Encyc.*, 541 and note.) But where the owner agrees to cut timber on his land and deliver it to the purchaser, when cut, such contract is valid. *Green v. R. R.*, 73—524; *Ives v. R. R.*, 142—131, 115 A. S. R., 732, 9 *Ann. Cas.*, 188; *Midyette v. Grubbs*, 145—85; *Burwell v. Chapman*, 159—209; *Turner v. Planters' Lumber Co.*, 92 *Miss.*, 767, 46 *So.*, 399, 131 A. S. R., 552; *Hirth v. Graham*, 50 *Ohio St.*, 57, 40 A. S. R., 641, 19 *L. R. A.*, 721; *Hurley v. Hurley*, 110 *Va.*, 31, 65 *S. E.*, 468, 18 *Ann. Cas.*, 968; it does not apply to trees severed as logs. *Lumber Co. v. Brown*, 160—281.

3. Growing crops.

(56) FLYNT, Extr., v. CONRAD,

61 N. C., 190, 93 A. D., 588—1867.

This was an action of trover, for corn. The facts were that the plaintiff's testator, on the 23d day of June, 1865, executed to the defendant a deed in fee for a tract of land on which there was a growing crop of corn. Evidence of various acts and admissions was given to show that the crop had been reserved by the vendor. The defendant was shown to have converted it; and a demand and refusal were also shown.

The defendant's counsel asked His Honor to charge that the corn and everything else upon the land passed by the deed, and that parol declarations by the defendant could not revoke the deed or raise any inference from which a tenancy at will could be set up.

His Honor charged the jury that a deed for land passed everything upon the land except what was legally reserved; that a growing crop of corn could be sold by parol so as to pass the title, and could also be reserved by parol; that if they were satisfied that it was the intention of the parties at the time the deed was executed, that only the land should pass, and the growing crop should belong to the testator, the plaintiff could recover; that the conduct of the parties afterwards might be considered as evidence of such intention.

There was a verdict and judgment for the plaintiff, and defendant appealed.

PEARSON, C. J. We concur in the opinion of His Honor for the reasons given by him.

It is said by the court in *Brittain v. McKay*, 23 N. C., 265; "The law makes a pointed distinction between those profits which are the spontaneous products of the earth or its permanent fruits, and the corn and other growth of the earth which are produced annually by labor and industry, and thence are called *fructus industriales*. The latter for most purposes are regarded as personal chattels. Upon the death of the owner of the land before they are gathered, they go to his executor, and not his heir. Upon the termination of an estate of uncertain duration, by an act other than that of the lessee, they belong to him as personal chattels, and do not go over to the owner of the soil. They are liable to be seized and sold under execution as personal chattels, and a sale of them while growing is not a sale of land or any interest in or concerning land, under the statute of frauds, but a sale of goods."

Thus it is seen that a growing crop is regarded as a personal

chattel. The statute (Rev. Code, ch. 34, sec. 21), puts them on the same footing in another very important particular, and still farther lessens the difference by making it larceny to steal any Indian corn, wheat, etc., growing in a field. So that the only difference now seems to be that the one never was attached to land or has been severed, whereas the other is not severed; and the legal effect of this is, that when land is conveyed the presumption is the wheat, for instance, that has been cut and remains shocked in the field, does not pass with the land, whereas, if it has not been cut, the presumption is that it does pass with the land; but the presumption in either case may be rebutted by the acts and declarations of the parties. If the grantee hauls in and houses the wheat that has been cut, with the knowledge and without objection on the part of the grantor, or if he admits that it was to belong to the grantee according to their agreement, no question would be made as to its being his property. The same acts and declarations in regard to wheat growing would rebut the presumption and justify the inference that according to their agreement it was to remain the property of the grantor. This may be shown by parol evidence, for the statute of frauds does not apply to an agreement concerning a growing crop. Nor does the admission of parol evidence violate the rule that a deed shall not be added to, varied or contradicted by such evidence.

In the former case the parol proof that according to the contract of sale the grantee was to have the wheat that remained shocked in the field, does not add to the deed, for its purpose and effect was only to execute one part of the contract, and there is no reason why the other part may not be established by parol proof; so, and for the same reason, in the latter case parol proof, that according to the agreement the grantee was not to have the growing crop, does not contradict the deed. It would be strange if the execution of one part of the agreement, in the only way in which it can be executed, should exclude proof and defeat the other part, for it must be borne in mind that the deed does not purport to set out the agreement.

In respect to fruit on trees and "not fallen," there is a diversity, for trees are a substantial and permanent part of the land, and a deed passing the land actually passes the trees as part thereof, and does not simply raise a presumption that it was the intention to pass them; hence, if there be a parol agreement to convey land and to except the fruit on trees, or certain timber trees, and a deed is executed which does not except the fruit or trees, that part of the agreement in respect to them is defeated, for the statute of frauds requires it to be in writing; and even if the agreement be in writing, that part of it can only be set up by a bill in equity to

reform the deed on the ground of accident or mistake in the draftsman, for the effect of the deed is to pass the land and every substantial part of it.

Our conclusion, that a growing crop differs only from a personal chattel in the circumstance of not being severed from the land, and that the presumption that it passes with the land is very slight, seems to be in accordance with the statute. Rev. Code, ch. 46, sec. 63. By the common law, if one died intestate his administrator took the growing crop as a part of the personal estate, and the heir took the land and the trees and fruit on them as part thereof. If he made a will the devisee took the crop under the presumption that, not being severed, it passed with the land, unless there was something in the will to rebut this presumption, in which case the executor took the crops. The statute makes the presumption the other way, to wit, that the crop does not pass with the land to the devisee, but passes to the executor as a personal chattel, unless it appears by the will that the devisee was to have it.

The doctrine that where there is a parol agreement, one part of which is carried into effect by a deed or other writing, that does not prevent the other part from being established by parol evidence, has been adopted and acted upon by our courts in several cases. *Twidy v. Saunderson*, 31 N. C., 5. A hires a negro to B, who gives a note for \$130, "being for hire of boy, Evartson." A sued B for taking the boy out of the county, and offered to prove by parol that it was a part of the agreement that the boy should not be carried out of the county: *Held*, that the evidence was properly admitted, "for the note is not a memorial of the entire agreement, but is simply execution of a part." *Manning v. Jones*, 44 N. C., 368: A made a parol agreement to purchase a tract of land of B at an agreed price. B agreed further that he would put certain repairs on the premises. B delivered a deed to A. The repairs not being made, A brought *assumpsit*, and offered to prove the agreement by a witness: *Held*, that the proof ought to have been received, the deed being an execution of one part of the agreement, the other having been left in parol. The proof offered was not to "add to, alter or explain the deed."

Daughtry v. Booth, 49 N. C., 87, presents the same question: *Held*, that a bond, given for the price of the hire of a slave and containing other stipulations as to his treatment and management, did not exclude parol evidence of another stipulation in the agreement, to wit, that the slave was not to be taken out of the county.

There is no error.

Judgment affirmed.

Growing crops, fructus industriales, not within the statute. *Brittain v. McKay*, 23—265; *Smith v. Tritt*, 18—241; *State v. Crook*, 132—1053; *Thigpen v. Staten*, 104—40; *Walton v. Jordan*, 65—170; *State v. Green*, 100—419. So with crude turpentine on the body of the tree, known as

"scrape," but not after the new turpentine is mingled with it. *Lewis v. McNatt*, 65—63. Bricks made from the soil are personalty. *Brown v. Morris*, 83—251. Perennial crops, *fructus naturales*, come within the statute; and the difficulty is in determining to which class the articles belong. *Backenstoss v. Stahler*, 33 Pa. St., 251, 75 A. D., 592; *Kirkeby v. Erickson*, 90 Minn., 299, 96 N. W., 705, 101 A. S. R., 411; *Grabow v. McCracken*, 102 Pac., 84, 23 L. R. A. (N. S.), 1218; *Simmons v. Williford*, 60 Fla., 359, 53 So., 452, Ann. Cas., 1912 C, 735.

4. Partnership agreements as to land.

(57) MAGUIRE v. KIESEL,

86 Conn., 453, 85 Atl., 689—1913.

This was an action for breach of an oral contract with respect to land. The plaintiff and the defendant were to purchase real estate jointly, construct a building thereon, and share equally in the profits to be derived from dealing in such property. The defendant purchased the property, took title in his own name, and refused to allow the plaintiff to have any interest in the proceeds. Judgment for plaintiff, and defendant appealed. Affirmed.

PRENTICE, J. . . . The agreement was not within the operation of the statute. The statute "contemplates only a transfer of lands or some interest therein." *Bostwick v. Leach*, 3 Day, 476, 484; *Hall v. Solomon*, 61 Conn., 476, 483, 23 Atl., 876, 29 Am. St. Rep., 218. The subject-matter of the agreement was not land or any interest therein. It was a fund of money representing profits from a joint enterprise in the nature of a partnership. *Bunuel v. Taintor*, 4 Conn., 568, 573. This enterprise, to be sure, was one which contemplated and involved a real estate transaction, and the fund to be divided was to be derived from that source. But that touching which the agreement was made, and in which by reason of the agreement the plaintiff claims an interest, was the fund. *Bunuel v. Taintor*, *supra*, presented a situation strikingly similar in its details to the present, and having the same essential features, and we there held that the contract was not within the statute. 4 Conn., 586, 573. The overwhelming weight of authority in other jurisdictions is to the same effect, that an agreement for a joint enterprise in the nature of a copartnership which has for its purpose the purchase, improvement, and sale of real estate for the profit arising therefrom to be divided among the joint undertakers as among partners, and which does not undertake to operate upon the ownership of or title to the realty or anything annexed thereto as a part or parcel of it and transferable alone by deed, is not within the statute. *Dale v. Hamilton*, 5 Hare, 382; *Chester v. Dickerson*, 54 N. Y., 1, 8, 13 Am. Rep., 550; *Bates v. Babcock*, 95 Cal., 479, 484, 30 Pac., 605, 16 L. R. A., 745, 29 Am. St. Rep.,

133; *Eaton v. Graham*, 104 Ill. App., 296; *Bruce v. Hastings*, 41 Vt., 380, 98 Am. Dec., 592; *Richards v. Grinnell*, 63 Iowa, 44, 54, 18 N. W., 668, 50 Am. Rep., 727; *Fountain v. Menard*, 53 Minn., 443, 445, 55 N. W., 601, 39 Am. St. Rep., 617; *Jones v. Davies*, 60 Kans., 309, 314, 56 Pac., 484, 72 Am. St. Rep., 354; *Dudley v. Littlefield*, 21 Me., 418, 422; *Howell v. Kelly*, 149 Pa., 473, 475, 24 Atl., 224. . . .

No error.

The statute does not apply—

To an agreement to pay for services in selling land. *Lamb v. Baxter*, 130—67; *Abbott v. Hunt*, 129—403. To a promise to pay for deficiency in the number of acres in a tract of land. *Sherrill v. Hagan*, 92—345; *McGee v. Craven*, 106—351; *Currie v. Hawkins*, 118—593. Where A sold land to B with a parol agreement that B was to pay him one-half that he might receive for the sale of the mineral interest. *Michael v. Foil*, 100—178; or to pay him a part of the proceeds of the resale of the land. *Massey v. Holland*, 25—197; *Sprague v. Bond*, 108—382; *Bourne v. Sherrill*, 143—381. Where A promises to pay B \$100 if he will buy C's land. *Little v. McCarter*, 89—233. Where several persons agree to buy land at a judicial sale and one of them bids it off. *Trice v. Pratt*, 21—626. To the transfer of a docketed judgment which is a lien on land. *Winberry v. Koonce*, 83—351; post, 196. To a mere license as distinguished from an easement. *R. R. v. Battle*, 66—540; *Kivett v. McKeithan*, 90—106; *Bridger v. Purcell*, 18—492. To an agreement to pay for improvements on land when the contract is rescinded. *Houston v. Sledge*, 101—640; or an agreement by the vendor to make certain improvements which are not mentioned in the deed. *Manning v. Jones*, 44—368. An agreement between A and B as partners, that B is to buy land from C, on which the firm is to build a mill, and after paying for the land and all expenses, to share equally in the profits. *Falkner v. Hunt*, 73—571; *Brown v. Hobbs*, 147—73; *Brogden v. Gibson*, 165—16; *Johnson v. Hogan*, 158 Mich., 635, 123 N. W., 891, 37 L. R. A. (N. S.), 889; *Henderson v. Henri*, 68 W. Va., 562, 71 S. E., 172, 34 L. R. A. (N. S.), 629, Ann. Cas., 1912 B, 318; but an oral agreement to receive a certain number of acres of land for selling is invalid. *Faircloth v. Kenlaw*, 165—228.

Parol trusts.—Since section 7 of the English Statute of Frauds has not been adopted in this State, a trust in land may be created by parol if declared before or at the time of the sale or transfer, but not afterwards. *Pittman v. Pittman*, 107—159; *Cobb v. Edwards*, 117—244; *Hamilton v. Buchanan*, 112—463; *McNair v. Pope*, 100—404; *Mulholland v. York*, 82—510; *Shields v. Whitaker*, 82—516; *Tankard v. Tankard*, 84—286; *McLeod v. Bullard*, 84—515; *Cheek v. Watson*, 85—195; *Gidney v. Moore*, 86—484; *Smiley v. Pearce*, 98—185; *Gorrell v. Alspaugh*, 120—362; *Blount v. Washington*, 108—230; *Cloninger v. Summit*, 55—513; *Cousins v. Wall*, 56—43; *Shelton v. Shelton*, 58—292; *Riggs v. Swan*, 59—118; *Whitfield v. Gates*, 59—136; *Hargrave v. King*, 40—430; *Thompson v. Newlin*, 38—338; *Gaylord v. Gaylord*, 150—227; *Anderson v. Harrington*, 163—140; *Jones v. Jones*, 164—320; *Brogden v. Gibson*, 165—16.

Discharge in pais.—While a writing is necessary to make a valid contract to convey land, it may be discharged in *pais*, but there must be more than a mere oral agreement, it must be acted on by the parties. *Faw v. Whittington*, 72—321; *Miller v. Pierce*, 104—389; *Gordon v. Collett*, 102—532; *Hemmings v. Doss*, 125—400; *Holder v. Purefoy*, 108—163; *Joyner v. Stancill*, 108—153; *Taylor v. Taylor*, 112—27; *Riley v. Jordan*, 75—180; *McDougald v. Graham*, 75—310; *Falls v. Carpenter*, 21—237; *Fortune v. Watkins*, 94—304; *Gorrell v. Alspaugh*, 120—362; *Bank v. Bank*, 77—186; *Herron v. Rich*, 95—500; *Lewis v. Gay*, 151—

168; Cutright v. Union Sav. Dev. & Invest. Co., 33 Utah, 486, 14 Ann. Cas., 725; Richardson v. Johnson, 41 Wis., 100, 22 A. R., 712.
See, generally, Statute of Frauds, Cent. Dig., secs. 84-118; Dec. Dig., 63-72.

Sec. 4. Contracts in consideration of marriage.

(58) DUNN v. THARP,

39 N. C., 7—1845.

The plaintiff and her husband made an oral agreement as to the settlement of certain property upon her, in consideration of the marriage, and this agreement was not carried out; she asks to have the settlement corrected to include the property.

GASTON, J. The specific execution of marriage articles, and the reformation of settlements executed after marriage, because of their not conforming to articles entered into before marriage, are among the ordinary subjects of equity jurisdiction. Parol agreements in consideration of marriage are within the statute of 29th Charles 2d, and, therefore, in the English courts, they are not executed, nor do they constitute a ground for correcting settlements actually made. But for that statute, such agreements, clearly established, would have the same claims to be enforced, as if they had been manifested by writing. The reason of this provision in the statute was to prevent those unguarded expressions of gallantry and improvident promises thoughtlessly made, or artfully procured during courtship, being *perverted* into deliberate and solemn engagements, conferring a right to compel performance. When the alleged agreement in this case was made, we had no statute denying efficacy to it, unless reduced to writing. The only difference, therefore, which we can regard as existing between such an agreement by parol, and one in writing, is a difference in the degree of proof necessary to establish it. As an agreement, peculiarly liable to misapprehension and misrepresentation, it calls for the greatest caution in the consideration of the evidence, by which it is sought to be made out. In the present cause, the extrinsic proofs are as full, clear, and satisfactory as could have been desired, and the instrument itself furnishes no slight testimony of the alleged mistake, for after conveying to the trustees seven negroes, by name, it proceeds to declare the trusts with respect to "the *nine* negroes aforesaid." . . .

The court is of opinion that she is entitled to have the mistake in the settlement corrected, as prayed for in her bill.

This section not being in force in N. C., such contracts may be oral unless they come within some other section, as for land, etc. Montgomery v. Henderson, 56—113. For the protection of creditors, marriage

settlements are required to be registered, which of course requires a writing. Rev. 963, 964, 985; *Credle v. Carrawan*, 64—422; *Brinkley v. Brinkley*, 128—503. In many States this section has been adopted; but it does not apply to mutual promises to marry, but to agreements respecting property rights based upon the consideration of marriage. *Frazer v. Andrews*, 134 Iowa, 621, 112 N. W., 92, 11 L. R. A. (N. S.), 593; St. of Frds., Cent. Dig., secs. 1-6; Dec. Dig., secs. 1-6.

Sec. 5. Contracts not to be performed within a year.

(59) ARK. MID. R. R. v. WHITLEY,

54 Ark., 199, 15 S. W., 465, 11 L. R. A., 621—1891.

BATTLE, J. This was an action for damages that were caused by a breach of a verbal agreement entered into by appellant and appellees in 1872, that appellee (Whitley) would permit appellant to build its railroad across his land, and that appellant would, in consideration thereof, construct, keep and maintain good and sufficient cattle-guards across its road on each side of appellee's land to prevent stock running at large from trespassing on his fields. In pursuance of this agreement, the road was built over the land, but good and sufficient cattle-guards were not kept and maintained. Appellant insists that the action can not be maintained because the agreement comes within the statute of frauds, . . . because it was not to be performed within one year after it was made. . . .

In determining when contracts come within the one year statute of frauds, courts have been governed by the words "not to be performed." They have treated them as negative words. In construing them it is said: "It is not sufficient to bring a case within the statute that the parties did not contemplate the performance within a year, but there must be a negation of the right to perform it within the year." According to this rule of construction, it is well settled that the statute only includes those contracts or agreements which, according to a fair and reasonable interpretation of their terms, in the light of all the circumstances which enter into their construction, do not admit of the performance in accordance with their language and intention, within a year from the time they were made, and that it includes no agreement if, consistently with its terms, it may be performed within that time. Accordingly, it is also well settled that agreements which contain no stipulation as to time, but depend for performance, either expressly or by reasonable implication, upon the happening of a certain contingency which may occur within the year, do not come within the statute; as, for instance, promises to pay money on the day of the promisor's marriage, on the death of a third party, or during the promisee's life; to educate a child, are not within the statute; and so, of course, whatever else be the contingency, pro-

vided it may happen within a year." *Roberts v. Rockbottom Co.*, 7 Met., 46; *Lyon v. King*, 11 Met., 411; *Foster v. McO'Blenis*, 18 Mo., 88; . . . *Peters v. Westborough*, 19 Pick., 364; . . . *Russell v. Slade*, 12 Conn., 460; . . . *Jilson v. Gilbert*, 26 Wis., 637; *Meyer v. Roberts*, 46 Ark., 84; *Erowne*, Stat. Fr., secs. 273-283, and cases cited; *Peter v. Compton*, 1 Smith L. C., 619-623, and cases cited. In this case the duration of appellant's promise . . . is limited by the time it should maintain and operate its road over appellee's land. . . . As its performance depended on an implied contingency which might have occurred within one year after it was made, it does not come within the statute of frauds. Affirmed.

This provision is not in the N. C. statute. See further, *Chase v. Hinckley*, 126 Wis., 751, 105 N. W., 230, 110 A. S. R., 896, 2 L. R. A. (N. S.), 738.

Sec. 6. Sale of goods, wares and merchandise.

(60) *GODDARD v. BINNEY*,

115 Mass., 450, 15 A. R., 112—1874.

Action to recover the price of a buggy built by the plaintiff for the defendant. The price was \$675, and the work was to be done in four months. The buggy was finished, the defendant failed to take it away promptly, and it was destroyed by fire. Judgment for defendant, and plaintiff appealed. Reversed.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other States of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. *Crookshank v. Burrell*, 18 Johns., 58; *Sewall v. Fitch*, 8 Cow., 215; *Robertson v. Vaughn*, 5 Sandf., 1; *Downs v. Ross*, 23 Wend., 270; *Eichelberger v. McCauley*, 5 Har. & J., 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in *Lee v. Griffin*, 1 B. & S., 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essen-

tially a contract for the sale of goods, and therefore subject to the provisions of the statute. See *Maberley v. Sheppard*, 10 Bing., 99; *Howe v. Palmer*, 3 B. & Ald., 321; *Baldehy v. Parker*, 2 B. & C., 37; *Atkinson v. Bell*, 8 *id.*, 277.

In this Commonwealth, a rule avoiding both of these extremes was established in *Mixer v. Howarth*, 21 Pick., 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. *Spencer v. Cone*, 1 Metc., 283. "The distinction," says Chief Justice Shaw, in *Lamb v. Crafts*, 12 Metc., 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In *Gardner v. Joy*, 9 Metc., 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are *Waterman v. Meigs*, 4 Cush., 497, and *Clark v. Nichols*, 107 Mass., 547. It is true that in "the infinitely various shades of different contracts" there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Stat., ch. 105, par. 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. It is proper to say also that the present case is a stronger one than *Mixer v. Howarth*. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action. . . .

Franklin v. Matoa Gold Mining Co., 158 Fed., 941, 16 L. R. A. (N. S.), 381, 14 Ann. Cas., 302; *Gies' Estate*, 160 Mich., 502, 125 N. W., 420, 19 Ann. Cas., 1288. This section has not been adopted in N. C. *Hurlbut v. Simpson*, 25—233. "Earnest money" was something paid to bind

the trade, and not necessarily a part of the purchase money. *Davis v. Martin*, 146—281.

Sec. 7. Requisites of the writing.

(61) *McCONNELL v. BRILLHART*,

17 Ill., 354, 65 A. D., 661—1856.

Bill for specific performance of contract to convey land, and the defendant pleaded the statute of frauds. The evidence consisted of two letters, which the defendant contended were insufficient to make the contract. Decree for plaintiff, and defendant appealed.

Affirmed.

SCATES, C. J. The leading principle that governs the case is one requiring contracts, or notes or memorandums of the contract, to be in writing, and signed by the party to be charged therewith, or by someone by him thereunto lawfully authorized under our statute of frauds and perjuries, which is a copy of the English statute. Cases have been excepted out of the statute where parol contracts have been in part performed by payments, possession, and improvements, but I do not propose to examine or discuss this class.

Of cases within the statute, courts have been called upon to discuss every clause of it, and apply it to every variety of circumstances and facts; in ascertaining what sort of writing is sufficient, what it shall express, and show upon its face, parties, description of the property, terms, conditions, and price, who shall sign it—principal and agent—what will constitute an agency, what is a sufficient signing, etc.

1. There is no form of language necessary; anything from which the intention may be gathered, as in other contracts, will be sufficient.

2. Any kind of writing, from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters, will suffice: *Doty v. Wilder*, 15 Ill., 407, 60 A. D., 756; *Anderson v. Harold*, 10 Ohio, 402; *Ide v. Stanton*, 15 Vt., 685, 40 A. D., 698; *Parkhurst v. VanCortlandt*, 1 Johns, Ch. 273; *Mactier v. Frith*, 6 Wend., 103, 21 A. D., 262. (Other citations omitted.)

3. The writings, notes, or memoranda shall contain on their face, or by reference to others that are traceable, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the thing, interest, or property, as will be capable of identification and separation from other of like kind, together with the terms, conditions, and price to be paid, or other consideration to be given: *Barry v. Coombe*, 1 Pet., 647, 650; *Abeel v. Rad-*

cliff, 13 Johns., 296, 7 A. D., 377; Bean v. Burbank, 16 Me., 458, 33 A. D. 681. (Other citations omitted.)

4. The party to be charged, or vendor of land, etc., or his lawfully authorized agent, shall sign it.

5. A verbal or parol agency is sufficient for this purpose: Doty v. Wilder, *supra*; Johnson v. Dodge, 17 Ill., 433. (Other citations omitted.)

6. The signing will be sufficient in the caption, or body of the memorandum, or by a subscription to it: Anderson v. Harold, *supra*; Barry v. Coombe, *supra*.

7. The contract or obligation must be signed with intent to enter into it, must be mutual, reciprocal, and upon good or valid consideration: Dorsey v. Packwood, 12 How., 134; Anderson v. Harold, *supra*; Utica, etc., R. R. Co. v. Brinckerhoff, 21 Wend., 139, 34 A. D., 220; Mactier v. Frith, *supra*.

Contracts within the statute of frauds are no more subject to change or alteration, or proof of their contents, etc., than other written contracts. Yet mistakes may be corrected: Pugh v. Cheseldine, 11 Ohio, 109. And the same degree of certainty required in other written contracts will be sufficient in contracts under the statute of frauds; *Id certum est, quod certum reddi potest*, is a maxim equally applicable to both. . . .

Testing the contract presented in these letters by the principles laid down, and we find nothing wanting to show a valid contract within the statute of frauds. . . . Affirmed.

(62) HALL v. MISENHEIMER,

137 N. C., 183, 49 S. E., 104, 107 A. S. R., 474—1904.

This was a civil action by the vendor against the vendee to recover the price agreed to be paid for land.

The plaintiff testified that he agreed to sell the land to defendant for \$1,200, and defendant agreed to buy at that price. That afterwards defendant presented a paper to him, saying, "The price is very high, but I will take the land; here is a receipt that I have prepared, you sign it now and I will pay you five dollars." The plaintiff signed the paper, which was as follows:

"Salisbury, N. C., January 18, 1904.

"Received from M. J. Misenheimer five dollars, part payment on one five-room house and lot, extending across Tar Branch, on Boundary street, No. house, 630.

"(Signed) J. A. Hall.

"Witness: M. D. Leffer."

This receipt was written for the defendant and at his dictation.

The defendant took possession of the lot, and afterwards refused to pay the purchase money, though plaintiff tendered him a deed on January 21, as defendant had requested. Defendant alleged that he was to have until January 20 to decide whether he would take the land, and he had notified the plaintiff that he would not take it. At the close of the evidence the court sustained a motion for nonsuit, and the plaintiff appealed.

WALKER, J. The argument in this court proceeded mainly upon the question whether there had been a sufficient signing of the receipt, under the statute of frauds, to bind the defendant. Upon this point our opinion is with the plaintiff. It has been held in England, whose statute (29 Charles II) has been substantially copied by us, that if the name of the party to be charged appears in the memorandum, so as to be applicable to the whole substance of the writing, and was written by the party, or by his authorized agent, it is immaterial where in the instrument the name happens to be placed, whether at the top or at the bottom, or whether it is merely mentioned in the body of the memorandum, the statute not requiring that the name should be subscribed. *Evans v. Hoare*, 1 Q. B. (1892), 593. The principle, as thus stated, has been adopted by Clark in his work on Contracts (2 Ed.), p. 89, and he cites numerous cases to sustain it. To those he cites may be added *Higdon v. Thomas*, 12 Md., 139. We think the same rule has been approved by this court in *Plummer v. Owens*, 45 N. C., 254, in which case it appeared that the names of the vendor and the vendee were written at the top of the memorandum, the latter being in the form of an account. The court held that the memorandum would have been sufficient in other respects if the description of the land had been more specific. See also *Clason v. Bailey*, 14 Johnson, 484, and other cases cited in Clark on Contracts (2 Ed.), p. 89, note 110. In our case the name of the vendee was inserted in the paper by his own direction, and it can not be questioned that he fully intended thereby to bind himself by the receipt as evidence of a contract to buy the land, so far as a signing of the writing was necessary for that purpose. *Cherry v. Long*, 61 N. C., 466, seems to be directly in point. It was not contended that the defendant was not bound by what his agent did in writing the receipt, though the latter's authority was given by parol. *Neaves v. Mining Co.*, 90 N. C. 412, 47 Am. Rep., 529.

But we think there is a serious obstacle in the way of plaintiff's recovery. The statute expressly requires a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith or by his lawfully authorized agent. The Code, sec. 1554. In order, therefore, to charge a party upon such a contract, it must appear that there is

a writing containing expressly or by implication all the material terms of the alleged agreement, which has been signed by the party to be charged, or by his agent lawfully authorized thereto. *Gwathney v. Cason*, 74 N. C., 5, 21 Am. Rep., 481, especially at page 10, where *Rodman, J.*, states the rule. *Miller v. Irvin*, 18 N. C., 104; *Mizell v. Burnett*, 49 N. C., 249, 69 Am. Dec., 744; *Rice v. Carter*, 33 N. C., 298; *Neaves v. Mining Co.*, 90 N. C., 412; *Mayer v. Adrian*, 77 N. C., 83. Many other cases could be cited from our Reports in support of the rule, but those we have already mentioned will suffice to show what is the principle and how it has been applied. In commenting on the policy of the statute, so far as it affects the vendee, and answering a suggestion that the statute applies only to the vendor, who alone conveys the land or any interest therein, *Ruffin, C. J.*, for the court, in *Simms v. Killian*, 34 N. C., 252, says: "The danger seems as great that a purchase at an exorbitant price may by perjury be imposed on one who did not contract for it, as that by similar means a feigned contract of sale should be established against the owner of the land. Hence the act in terms avoids entirely every contract, of which the sale of land is the subject, in respect of a party, that is, either party who does not charge himself by his signature to it after it has been reduced to writing." So, in a case where a stipulation that the vendee would open a street, which constituted a part of the price to be paid for the land, was not stated in writing, it was held by this court that the vendor could not recover for a breach of the stipulation, because, being a part of the price, it was also a part of the agreement, and was not evidenced by a writing which had been signed by the defendant. *Hall v. Fisher*, 126 N. C., 205; *Ide v. Stanton*, 15 Vt., 685, 40 Am. Dec., 698. The fact that the defendant in this case paid five dollars on the purchase-money and took possession of the land does not change the result. The doctrine of part performance is not now recognized by this court.

The party to be charged upon a contract, within the meaning of the statute is the defendant in the action, or the party against whom it is sought to enforce the obligation of the contract. It is not the vendor, unless he occupies upon the record the position of the party who is called upon to perform his contract. "The object of the statute was to secure the defendant." *Pearson, J.*, in *Rice v. Carter*, 33 N. C., 298. See also *Mizell v. Burnett*, 49 N. C., 249, 69 Am. Dec., 744; *Love v. Welch*, 97 N. C., 299; *Green v. R. R.*, 77 N. C., 95; *Love v. Atkinson*, 131 N. C., 544. Anything said in *Taylor v. Russell*, 119 N. C., 30, in conflict with this view of the statute can not, we think, be sustained. *Green v. R. R.*, *supra*, which is cited in *Taylor v. Russell*, does not support the proposition that the vendee is not protected by the statute. In

that case the plaintiff, who was the vendee, sued the defendant, who was the vendor, to recover the value of the wood which he agreed to give for the land at a stipulated price. The court held merely that as the plaintiff had sued on the contract and the defendant had waived that statute he was bound by its terms and must recover, if at all, not the value of the wood, but the price agreed upon. He could not in such a case repudiate his contract, when the defendant was willing to perform it. In support of this ruling, the court cited *Mizell v. Burnett*, *supra*, which case directly sustains the doctrine as we have stated it. The defendant, therefore, can avail himself of the statute as the party to be charged.

This court has held, it is true, that the consideration of the contract need not be stated. *Miller v. Irvine*, 18 N. C., 104; *Ashford v. Robinson*, 30 N. C., 114; *Thornburg v. Masten*, 88 N. C., 293; but in each of those cases the vendor was the defendant and the party to be charged. There is quite a difference between the price to be paid by the vendee and the consideration necessary to support the contract and enforce it against the vendor. The latter can be shown by parol, as at common law, and the writing, as said by *Ruffin, C. J.*, in *Miller v. Irvine*, *supra*, need not contain any matters but such as charge him, the vendor, that is, such stipulations as are to be performed on his part. He is to convey and the writing must be sufficient to show that this duty rests upon him as one of the parties to the contract when he is sought to be charged. The vendee is to pay a certain price, and the writing must likewise show his obligation—its nature and extent—when the action is against him. *Clark on Contracts* (2 Ed.), pp. 85, 86 and 87; *Williams v. Morris*, 96 U. S., 444. It must show the price, for, otherwise, the true contract of the vendee as to one of its essential terms would not be reduced to writing, and we could not see from the writing what it is so as to enforce it against him. If we permitted the vendor to supply this defect by parol proof, it would at once introduce all the mischiefs which the statute was intended to prevent. *Simms v. Killian*, *supra*; *Williams v. Morris*, *supra*.

The receipt in this case does not show the price. How then can the court be informed as to what the price is, unless it admits parol testimony to prove the fact? To do so would be in direct violation of the statute—its letter and its spirit.

The judgment of nonsuit was properly granted in the court below. No error.

Parties.—The writing must show the parties to the agreement. *Kent v. Edmondston*, 49—529; *Mayer v. Adrian*, 77—83; *Cherry v. Long*, 61—466; *Woodcock v. Merrimon*, 122—731; *Haskell v. Tukesbury*, 92 Me., 551, 69 A. S. R., 529; *Mentz v. Newwitter*, 122 N. Y., 491, 25 N. E., 1004, 11 L. R. A., 97; *Frahm v. Metcalf*, 75 Neb., 241, 106 N. W., 227, 13 Ann. Cas., 312.

Terms.—The writing must show all the material terms of the agreement. *Mayer v. Adrian*, 77—83; *Cherry v. Long*, 61—466; *Gwathney v. Cason*, 74—5; *Phillips v. Hooker*, 62—193; *Plummer v. Owens*, 45—254; *Mallory v. Mallory*, 45—80; *Hall v. Fisher*, 126—205; *Dickerson v. Simmons*, 141—325; *Neaves v. Mining Co.*, 90—412; *McGee v. Blankenship*, 92—563; *Gordon v. Collett*, 102—532; *Wellman v. Horn*, 157—170; *Williams v. Morris*, 95 U. S., 444; *Ullsperger v. Meyer*, 217 Ill., 262, 75 N. E., 482, 2 L. R. A. (N. S.), 221, 3 Ann. Cas., 1032.

Subject-matter.—This should be described sufficiently to be identified, and this does not exclude parol evidence to “fit the description to the thing.” *Murdock v. Anderson*, 57—77; *Farmer v. Batts*, 83—387; *Bread v. Munger*, 88—297; *Fortescue v. Crawford*, 105—29; *Lowe v. Harris*, 112—472; *Farthing v. Rochelle*, 131—563; *Bateman v. Hopkins*, 157—470; *Flegel v. Dowling*, 54 Ore., 40, 102 Pac., 178, 135 A. S. R., 812, 19 Ann. Cas., 1159; *Cunha v. Callery*, 29 R. I., 230, 132 A. S. R., 811, 69 Atl., 1001, 18 L. R. A. (N. S.), 811.

Consideration need not be stated in the writing. See cases cited in the principal case, and also *Green v. Thornton*, 49—230; *Neaves v. Mining Co.*, 90—412; *Tunstall v. Cobb*, 109—316; *Hargrove v. Adcock*, 111—166. *Contra*, see *Clark Cont.*, pp. 86, 87, and note; 29 Am. & Eng. Encyc., 868 and note, which seems to be the rule in England and most of the States; *Bateman v. Hopkins*, 157—470; *Saunders v. Bank*, 112 Va., 443, 71 S. E., 714, Ann. Cas., 1913 B, 982; *Wain v. Warlters*, 5 East, 10, 6 E. R. C., 231; *Zimmerman v. Zehendner*, 164 Ind., 466, 73 N. E., 920, 3 Ann. Cas., 655; *Siemers v. Siemers*, 65 Minn., 104, 67 N. W., 802, 60 A. S. R., 430.

Several papers.—If more than one writing, they must be connected physically or by internal evidence, so that there can be no uncertainty as to their meaning; the connection can not be shown by parol. *Mayer v. Adrian*, 77—83; *Dowdy v. White*, 128—17; *Dickerson v. Simmons*, 141—325; *Gordon v. Collett*, 102—532; *Tunstall v. Cobb*, 109—316; *Mfg. Co. v. Hendricks*, 106—485; *Fortescue v. Crawford*, 105—29; *Cunha v. Callery*, 29 R. I., 230, 69 Atl., 1001, 132 A. S. R., 811, 18 L. R. A. (N. S.), 616; *Halsell v. Renfrow*, 14 Okla., 674, 2 Ann. Cas., 286.

Signed.—By the party to be charged therewith. *Rice v. Carter*, 33—298; *Green v. R. R.*, 77—95; *Wade v. New Bern*, 77—460; *Davison v. Land Co.*, 126—704; *Love v. Atkinson*, 131—544; *Lumber Co. v. Corey*, 140—462; *Neaves v. Mining Co.*, 90—412; *Love v. Welch*, 97—200; *Improvement Co. v. Guthrie*, 116—381; *Taylor v. Russell*, 119—30; *Gudger v. Fletcher*, 29—372; *Plummer v. Owens*, 45—254; *Brown v. Hobbs*, 154—544; *Wellman v. Horn*, 157—170; *Burris v. Starr*, 165—657; *Flowe v. Hartwick*, 167—448; *Harper v. Goldschmidt*, 156 Cal., 245, 104 Pac., 451, 134 A. S. R., 124, 28 L. R. A. (N. S.), 689. In the sale of land it has been held in some cases that the vendor is the party to be charged, and that he must sign the writing though the vendee does not. See cases above cited, and *Murray v. Crawford*, 138 Ky., 25, 127 S. W., 494, 28 L. R. A. (N. S.), 680, and note. It may be signed anywhere in the instrument, and may be by pencil or any way indicating the intention, and may be after the contract is made. It may be by agent, whose authority need not be in writing. *Oliver v. Dix*, 21—158; *Phillips v. Hooker*, 62—193; *Washburn v. Washburn*, 39—306; *Neaves v. Mining Co.*, 90—412; *Lamb v. Baxter*, 130—67; *Abbott v. Hunt*, 129—403; *Smith v. Brown*, 132—365; *Blacknall v. Parish*, 59—70; *Love v. Harris*, 156—88, 36 L. R. A. (N. S.), 927; *Burris v. Starr*, 165—656; *Wellman v. Horn*, 157—170; *Walker v. Hafer*, 170 Fed., 37, 24 L. R. A. (N. S.), 315; *Brandon v. Pritchett*, 126 Ga., 286, 55 S. E., 241, 7 Ann. Cas., 1093. Auctioneer is the agent of the seller and buyer to sign such writing as will bind the parties. *Cherry v. Long*, 61—466; *Mayer v. Adrian*, 77—83; *Gwathney v. Cason*, 74—5; *Proctor v. Finley*, 119—536; it seems that this should be done at the time of the transaction. *Dickerson v. Simmons*, 141—325; *Love v. Harris*, 156—88, 36 L. R. A. (N. S.), 927, Ann. Cas., 1912 D, 1060.

Seal is not necessary. *Simmons v. Spruill*, 56—9; *Mitchell v. Bridger*, 113—63; *Worrall v. Munn*, 5 N. Y., 229, 55 A. D., 330.

Registration is not necessary between the parties in the case of land, but is necessary to protect against the claims of third persons, as creditors and purchasers for value. *Edwards v. Thompson*, 71—177; *Mauney v. Crowell*, 84—314; *White v. Holley*, 91—67; *Hargrove v. Adcock*, 111—166; *Wood v. Tinsley*, 138—507.

Delivery is not necessary. *McGhee v. Blankenship*, 95—563; *Flowe v. Hartwick*, 167—448; *Charlton v. Col. Real Est. Co.*, 67 N. J. Eq., 629, 3 Ann. Cas., 402.

Sec. 8. Effect of noncompliance with the statute.

(63) *ALBEA v. GRIFFIN et al.*,

22 N. C., 9—1838.

This was a bill for the specific execution of a contract for the sale of a tract of land containing fifty acres. The defense was the Act of 1819 avoiding parol contracts for the sale of land and slaves.

Upon the hearing the case was, that the ancestor of defendants contracted to convey the land to the plaintiff for \$50, to be taken up in goods at the store of the plaintiff; that the goods were in part delivered; that the land was surveyed, and the plaintiff put in possession of it by the vendor; that he, the plaintiff, built a house upon it, and that the vendor gave him the assistance in raising it, which is usual between neighbors in the country. The vendor died without executing a deed for the land, and it descended to the defendants.

GASTON, J. It is objected on the part of the defendants, that by our Act of 1819 all parol contracts to convey land are void, and that no part performance can, in this State, take a parol contract out of the operation of the statute. We admit this objection to be well founded, and we hold as a consequence from it that the contract being void, not only its specific performance can not be enforced, but that no action will lie at law or in equity for damages because of nonperformance. But we are nevertheless of opinion that the plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of defendants encouraged him to expect should become his own, and by the act of God, or by the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury. (*Baker and Wife v. Carson*, 1 Dev. & Bat. Eq., 381.) If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff

without compensation for the additional value which these improvements have conferred upon the property.

The court therefore directs that it be referred to the clerk of this court, to inquire and report what is the additional value conferred on the land in question by the improvements of the plaintiff, and that he state an account between the parties, charging the plaintiff with a fair rent since the death of Andrew Griffin, and crediting him with what has been advanced towards payment for said land, and with the amount of the additional value so conferred upon it.

Per Curiam.

Decree accordingly.

(64) LUTON v. BADHAM,

127 N. C., 96, 37 S. E., 143, 53 L. R. A., 337—1900.

This was a civil action, the facts being given in the opinion. From a judgment of nonsuit, the plaintiff appealed.

FURCHES, J. The plaintiff is the administratrix of Alexander Badham, her former husband, and the defendant is the father of her intestate. The plaintiff alleges that the defendant was the owner of a vacant lot in the town of Edenton, and upon the marriage of her intestate the defendant proposed to him that, if he would build upon and improve said vacant lot, it should be his; that he would make him a fee simple title to it; that upon this agreement her intestate entered upon said lot, and greatly improved the same, by erecting a dwelling and other outhouses thereon, which improvements greatly enhanced the value of said lot, to the amount of \$400; that her husband, the intestate, lived on said lot in the dwelling-house he had built with the plaintiff, his wife, from 1892 until 1897, when he died, leaving the plaintiff and two children, the result of their marriage; that plaintiff continued to occupy said house and premises for some time after the death of her intestate, when she surrendered the possession to the defendant upon his request, and upon his promise to give her a part of the rent for the benefit of her said children, but that since the defendant has gotten possession of said property he refuses to pay her any part of the rent, and refuses to convey said land to her children; that said contract and agreement between her intestate and defendant was never reduced to writing, her intestate having full confidence in the defendant, and believing that he would keep his said promise, and convey him the lot; that said contract and agreement being in parol only, and the defendant refusing to carry out the agreement and to convey said property, the plaintiff asks that he may be decreed to account and pay for the valuable and permanent improvements her intestate put upon said lot.

The defendant answers, and admits that the plaintiff's intestate was his son; that he went upon said lot and occupied the same with his family until his death; and that he built some small house for his use while there, but not the dwelling-house, which defendant alleges he built; but he denies that there was any agreement between him and plaintiff's intestate that, if he would go upon said lot and improve it, he would convey said lot to the plaintiff's intestate, and denies that he said anything to said intestate to induce him to improve said lot, with the expectation that he would convey the same to him; that, as the intestate was his son, he simply permitted him to occupy said lot without rent, and defendant admits a demand for title, and for an account and settlement for improvements, and that he has refused the same, but he did not formally plead the statute of frauds.

Upon the trial, the court formulated issues as to whether there was a parol contract or agreement between defendant and intestate that, if intestate would improve said lot, the defendant would make him a title to it, and, if there was, did plaintiff's intestate, in pursuance of said agreement, enter upon said lot and place valuable permanent improvements thereon. Upon these issues the plaintiff introduced witnesses and asked them if they ever heard the defendant say how it was and under what circumstances the plaintiff's intestate entered upon, improved, and occupied said lot; stating that the purpose of asking these questions was to prove that there was such a parol contract between the defendant and intestate as that alleged in the complaint. The defendant objected, objection sustained, and the witness was not allowed to answer. Plaintiff thereupon submitted to a judgment of nonsuit, and appealed. This is the case, and the only question presented for our consideration is as to the competency of this evidence.

It would seem that *Sain v. Dulin*, 59 N. C., 195, and *Dunn v. Moore*, 38 N. C., 364, cited by the defendant, sustain the ruling of the court. But the question has been before the court a great number of times, and we must admit that the opinions do not appear to be always in harmony. A parol contract for the sale of land is not a void contract, but voidable, upon denial or a plea of the statute of frauds. *Thomas v. Kyles*, 54 N. C., 302; *Gulley v. Macy*, 84 N. C., 434. But when the alleged contract is denied, or the statute of frauds pleaded, this avoids the contract, because the party alleging it is not allowed to show by parol evidence what the contract was. The English rule seems to have been that the statute of frauds must be pleaded, or the party would be allowed to proceed with parol evidence to establish the contract. But our courts have extended the rule so as to include a denial of the contract as well as by pleading the statute of frauds. *Gulley v. Macy*,

supra, and many other cases. Whether it would not have been better that we had followed the English rule is not now an open question, as the rule seems to be firmly established the other way in this State.

But the plaintiff contends that she is not claiming the right to establish—to set up—a parol contract; that she is not asking a specific performance, nor is she asking damages for the breach of a parol contract; that her contention is that, by reason of the contract or agreement between her intestate and the defendant, the intestate was induced to enter upon the defendant's land, and place permanent and valuable improvements on the same; and that this is a new cause of action, collateral to the contract, based upon a new consideration given by equity to prevent fraud. If the plaintiff is entitled to maintain this action against the defendant, it is purely upon equitable principles. Before the junction of the jurisdiction of law and equity in the same court, a bargainee, in a parol contract for the sale of land where the contract was repudiated by the bargainor, could not have relief against the bargainor in a court of equity, if legal demands alone were involved. If the bargainee had paid the purchase price, or a part of it, in money or specific personal property, he had a right of action at law to recover the same back. And a court of equity would not aid him, unless there was something else connected with the transaction that gave him an equity. Then the court of equity, having acquired jurisdiction of the matter, would proceed to investigate and settle legal as well as equitable demands. *Chambers v. Massey*, 42 N. C., 286. But no such question as this can arise now, as the same courts have both jurisdictions, and administer both law and equity.

If the plaintiff's intestate entered upon the defendant's land under a parol contract, and placed valuable and permanent improvements thereon, and the defendant, after such improvements were made, repudiates the contract, and refuses to convey, the plaintiff has an equitable cause of action. *Ellis v. Ellis*, 16 N. C., 345; *Albea v. Griffin*, 22 N. C., 9; *Lyon v. Crissman*, *Ibid.*, 268; *Pitt v. Moore*, 99 N. C., 85; *Tucker v. Markland*, 101 N. C., 422; *Chambers v. Massey*, 42 N. C., 286; *Thomas v. Kyles*, 54 N. C., 302; *Love v. Nelson*, 54 N. C., 339, and many other cases. The court says in many of these cases that it would be against equity and good conscience to allow the bargainor to repudiate his contract, and thereby reap the benefit of the bargainee's money and labor.

But it is contended by the defendant that, if this is so, the defendant is protected from any liability to account for the reason that he had denied the contract, and the law will not allow the

plaintiff to prove it. And this is admitted to be true, so far as establishing the contract for the purpose of enforcing a specific performance, or the recovery of damages for the breach thereof. But can not the plaintiff prove there was a contract under which her intestate was induced to enter and put valuable improvements on the land? If she can not, the fraud upon which the plaintiff's action is based is protected by the simple answer of the defendant. This, it seems to us, can not be and is not the law in this State. In *Albea v. Griffin*, *supra*, which seems to be regarded as the leading case, it does not distinctly appear that the defendant denied the contract, and if he did not, certainly no stress is put upon that fact by the learned Judge who wrote the opinion. The opinion in *Albea v. Griffin* was written by Judge *Gaston* at June Term, 1838, and at June Term, 1839, he wrote the opinion in the case of *Lyon v. Crissman*, 22 N. C., 268, in which he uses this language: "If the objection be that the agreement is void, because not reduced to writing, and this objection could avail anything, it should have been set up in the pleadings. But this has not been done. The plaintiff avers one agreement, and the defendant sets up another, and the parties have left to proof which representation is the true one." *Ellis v. Ellis*, 16 N. C., 245, was an action for specific performance of a parol contract for the sale of land, and alternate relief was demanded for betterments. The answer denied the contract, and the court held that it could not be specifically enforced, but allowed evidence, and ordered an account as to rents and profits and for betterments. In *Pitt v. Moore*, 99 N. C., 85, which was an action on a parol contract for betterments, where the defendant did not admit the contract as alleged, and set up a different contract or state of facts to those alleged by the plaintiff (and this was an action by the personal representative), and the plaintiff was allowed to prove the agreement, and the court granted the relief prayed for and ordered an account to be taken, in the opinion of the court the following language is used: "Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson*, 16 N. C., 381, in which there was a divided court, but *Ruffin, C. J.*, and *Gaston, J.*, concurring, and *Albea v. Griffin*, 22 N. C., 9, by a unanimous court, to *Hedgepeth v. Rose*, 95 N. C., 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by parol contract or agreement, which can not be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, without compensation for the additional value which these improvements have conferred upon the property, and rests upon the

broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own acts. This was an action by the personal representative. *Tucker v. Markland*, 101 N. C., 422, is to the same effect as *Pitt v. Moore*, where plaintiffs brought an action for possession of land, and defendants answered, setting up a parol contract of purchase by their ancestor, alleging permanent improvements, and asking payment for the same. The plaintiffs replied, denying the contract and defendant's right to have pay for improvements. But the court allowed evidence to be introduced to establish the parol contract, which the jury found to have been made by defendants' ancestor, and the court ordered a reference as to rents and profits and improvements, and this court affirmed the judgment. *Thomas v. Kyles*, 54 N. C., 302, is a case where the plaintiff alleged that his intestate made a parol contract with the defendant for the purchase of land, entered upon and took possession thereof, and put valuable improvements on the same. The defendant answered, denying the contract. But the plaintiff was allowed to prove the contract by parol evidence, and, while the court refused to compel a specific performance, the plaintiff's claim for betterments was allowed. Other cases might be cited as authority for the admission of parol evidence, to show that the party entered and placed valuable improvements on land under a parol contract or promise to convey, but we do not deem it necessary to do so. It seems to be settled by this court that it may be done; and the cases cited show that where a party is induced to go upon land, and put valuable improvements thereon, by the owner thereof, upon a parol promise to convey the same to the party putting the improvements on the land, and the owner afterwards refuses to convey, it is held by this court to be a fraud upon the party so induced, and the court will compel him to pay for such improvements.

It was also contended for the defendant that the right to have pay for improvements only exists while the bargainee is in possession, and *Albea v. Griffin* and *Pass v. Brooks*, 125 N. C., 129, were cited as authority for this position. But neither of these cases, nor any other case that has been called to our attention, supports this contention. In these cases and other like cases, the bargainee being in possession, the court said that such bargainee should not be turned out until the bargainor paid for the improvements. This was only a means resorted to by the court to enforce the bargainee's recovery, and not as the ground of the plaintiff's equity, which was made distinctly to rest upon the fraud of the bargainor; and it would be just as fraudulent and unconscionable for the bargainor to take profit by means of such fraud, if the bargainee was out of possession, as if he was still in possession. It is the fraud

that gives the right of action, and not the possession. But the cases of *Tucker v. Markland*, *Pitt v. Moore*, *Thomas v. Kyles*, *supra*, and other cases, seem to settle this contention against the defendant. It is true that it is said in *Pass v. Brooks* that the contract is admitted, and, defendants being in possession, the case of *Albea v. Griffin* was followed as to the judgment; and the statement that the contract was admitted is only a statement of the facts of the case. There is nothing in the case of *Pass v. Brooks* that conflicts with what is said in this opinion. The doctrines announced in this case, or many of them, are held in the recent case of *North v. Bunn*, 122 N. C., 766, in which case it is held that the bargainee was entitled to an account, and that, if anything should be found in her favor, it should be a lien on the land. It may be that this judgment was given owing to the peculiar circumstances of the case. But from the authorities cited, and the strong equitable reasons appealing to our consciences for redress against a fraud, we are of the opinion that the evidence should have been admitted; and if it shall be found on trial that the plaintiff's intestate was induced to go upon the lot and put valuable permanent improvements upon the same, by reason of the promise of the defendant that he would convey the lot to him, the plaintiff will be entitled to have an account to ascertain the value of the improvements, subject to the rents and profits, while the plaintiff and intestate were in possession, and, if a balance be found in her favor, the judgment shall constitute a charge on the rents and profits of said lot until it is paid, and a receiver may be appointed if it shall be deemed necessary.

Error.

New trial.

(65) SEAMAN v. ASCHERMANN,

51 Wis., 678, 37 A. R., 849—1881.

ORTON, J. The facts stated in the complaint make a clear case of a verbal agreement to execute a five years' lease, fully performed by the plaintiff, and partly performed by the defendants. The only question presented is, can this verbal agreement under these circumstances be enforced? Aside from the above facts of performance, it is conceded that the agreement is void by the statute of frauds, and can neither be enforced in equity nor damages recovered for its breach in a court of law. That this agreement for or as a lease for five years, even under the circumstances stated in the complaint, is so invalid under the statute that the rents reserved thereby, or damages for the breach of the same, could not be recovered in an action at law, is perfectly well settled. Story Eq. Jur., sec. 757. It is only in a court of equity, if

at all, that relief can be obtained, and that for specific performance, if performance is possible. The general principle by which courts of equity grant specific performance of parol contracts for the sale of lands or interests in lands is clearly stated by Mr. Justice Story, in his great work on Equity Jurisprudence: "That they do, however, interfere in some cases within the reach of the statute is equally certain. But they do so, not upon any notion of any right to dispense with it, but for the purpose of administering equities subservient to its true objects, or collateral to it and independent of it." Story Eq. Jur., sec. 754.

The same learned author lays down more strictly the ground of equitable interference in such cases, as follows: "Courts of equity will enforce a specific performance of a contract within the statute where the parol agreement has been partly carried into execution. The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be able to practice a fraud upon the other, and it could never be the intention of the statute to enable any party to commit such a fraud with impunity." And again, "Where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious, that if the latter should refuse, it would be a fraud upon the former to suffer his refusal to work to his prejudice." *Id.*, sec. 759. (The court here quotes from *Potter v. Jacobs*, 111 Mass., 32; *Paine v. Wilcox*, 16 Wis., 202, and other cases.)

We are aware that in a very few of the States this doctrine is not upheld, but in England and in most of the States it is now undisputed. The facts stated in the complaint make one of the strongest and clearest cases for its application to be found in the books. The plaintiff was put to great expense to change and remodel the block of stores to make them suitable for the business of the defendants, and at their special instance and request, and in consequence and fulfillment of the agreement, and made out and tendered the lease to the defendants for them to execute on their part; and the defendants went into full possession and enjoyment of the premises under said agreement, and for two years paid the plaintiff the rents stipulated in the agreement and the lease to be executed, and merely delayed, by sheer neglect and without refusal, to execute the lease on their part. A stronger case for the exercise of this equity jurisdiction could hardly be made. The complaint stated a good cause of action, and the demurrer should have been overruled.

For effect of noncompliance generally, see 29 A. & E. Enc., 801; 20 Cyc., 283; Clark Cont., secs. 50, 51; Pollock Cont., 783.

The contract is not void but voidable. *Dail v. Freeman*, 92—351; *Curtis v. Lumber Co.*, 109—40; *Williams v. Lumber Co.*, 118—928; *Loughran v. Giles*, 110—423.

The contract can be proved only by the writing itself, not as the best evidence, but as the only admissible evidence. *Morrison v. Baker*, 81—76; *Williams v. Lumber Co.*, 118—928.

The parol contract is valid unless the statute is invoked in some way. *Kenner v. Mfg. Co.*, 91—421; *Hemmings v. Doss*, 125—400; *Cowell v. Ins. Co.*, 126—684; but the defendant could not take advantage of it by demurrer. *Loughran v. Giles*, 110—423; *Hemmings v. Doss*, 125—400. In *Lyon v. Crissman*, 22—268, it was held that the statute should be pleaded; but a denial by the defendant was held sufficient in *Barnes v. Brown*, 71—507; *Bonham v. Craig*, 80—224; *Young v. Young*, 81—91; *Hall v. Lewis*, 118—509; *North v. Bunn*, 122—766. The rule as now adopted is that if the plaintiff declares upon a verbal promise void under the statute, and the defendant either submits in his answer to perform it, or admits the contract and does not insist upon the statute, the court will give effect to it; but if the defendant denies the promise, or sets up a different agreement, or admits the contract and pleads the statute, parol evidence can not be used to show the contract. *Holler v. Richards*, 102—545; *Vann v. Newsom*, 110—122; *Pitt v. Moore*, 99—85; *Jordan v. Furnace Co.*, 126—143; *Loughran v. Giles*, 110—423; *Williams v. Lumber Co.*, 118—928; *Hall v. Lewis*, 118—509; *Haun v. Burrell*, 119—544; *Browning v. Berry*, 107—231; *Thigpen v. Staten*, 104—40; *Washington v. Blount*, 100—230; *Anders v. Hill*, 144—614; *Allen v. Chambers*, 39—125; *Taylor v. Russell*, 119—30; *Fortescue v. Crawford*, 105—29; *Tucker v. Markland*, 101—422; *Improvement Co. v. Guthrie*, 116—381; *Henry v. Hilliard*, 155—372. In some courts it is held that objection may be made by demurrer where the defect appears in the complaint. 20 Cyc., 312, and cases cited.

The English courts hold that the statute does not affect the substance of the contract, but simply prescribes a rule of evidence, and hence must be pleaded; but our courts hold that the statute affects the contract itself, so that whenever the party has to prove it he must do so by the legal evidence. *Gulley v. Macey*, 84—434.

Part performance.—For what will bring a case within this doctrine, see, *Halligan v. Frey*, 161 Iowa, 185, 141 N. W., 944, 49 L. R. A. (N. S.), 113, and note; *Adams Eq.*, 86; *Bishp. Eq.*, secs. 384, 385.

Specific performance of the parol contract can not be had where the statute is invoked in any way; the doctrine of part performance is not recognized in this State. *Ellis v. Ellis*, 16—345; *Allen v. Chambers*, 39—125; *Barnes v. Teague*, 54—277. The remedy of the parties where the contract is repudiated is stated fully in the case above, *Luton v. Badham*. Other cases not cited in that case are, *Smith v. Smith*, 36—83; *Winton v. Fort*, 58—251; *Barnes v. Brown*, 71—507; *Long v. Finger*, 74—502; *Daniel v. Crumpler*, 75—184; *Simmons v. Beaman*, 76—43; *Wilkie v. Womble*, 90—254; *Pendleton v. Dalton*, 92—185; *Syme v. Smith*, 92—338; *Vann v. Newsom*, 110—122; *Loughran v. Giles*, 110—423; *Field v. Moody*, 111—353; *Rumbough v. Young*, 119—567; *Love v. Atkinson*, 131—544; *Ford v. Stroud*, 150—362.

In *Dunn v. Moore*, 38—364, *Allen v. Chambers*, 39—125, and *Sain v. Dulin*, 59—196, it was held that where the contract was denied or a different agreement set up, the court could grant no relief because it could hear no evidence; but it seems that these cases are virtually overruled by *Luton v. Badham*.

A parol vendee may interplead in a suit by a subsequent purchaser, and claim compensation for his improvements as against the amount due the vendor. *Kelly v. Johnson*, 135—647. But a parol vendee can not resist a suit for possession by a subsequent purchaser under a duly registered deed; the right of the vendee is not under the contract nor to have the original vendor declared a trustee, but to have compensation. *Wood v. Tinsley*, 138—507; *Collins v. Lackey*, 31 Okla., 776, 123 Pac., 1118, 40 L. R. A. (N. S.), 883.

Who may repudiate.—The vendor if bound orally may repudiate when sued or may sue for the land, but he can not keep the money or the

improvements. The vendee if bound orally may repudiate when sued, but he can not sue for his money or compensation when the vendor is willing to perform or is bound in writing. If either is bound in writing, he can not take advantage of the statute as against the other. *Clancy v. Craine*, 17—363; *Long v. Finger*, 74—502; *Green v. R. R.*, 77—95; *Syme v. Smith*, 92—338; *Improvement Co. v. Guthrie*, 116—381; *Love v. Welch*, 97—200; *Simms v. Killian*, 34—252; *Davis v. Yelton*, 127—348; *Davidson v. Land Co.*, 126—704; *Love v. Atkinson*, 131—544; *Faust v. Shoffner*, 62—242. (*Taylor v. Russell*, 119—30, *contra*, overruled in *Hall v. Misenheimer*, *supra*.) *Brown v. Hobbs*, 154—544.

Where A had an option in writing on B's land and it was extended by parol at B's request, B is estopped to plead the statute if A has been ready to comply with the terms. *Alston v. Connell*, 140—485; 20 *Cyc.*, 287.

Strangers to the contract can not take advantage of the statute. *Davis v. Inscoc*, 84—396; *Parker v. Allen*, 84—466; *Cowell v. Ins. Co.*, 126—684; *Plaster Co. v. Plaster Co.*, 156—455.

Avoidance of the contract avoids it in toto. *Clancy v. Craine*, 17—363; but in a divisible contract the part not within the statute may be valid and the other invalid. *Wooten v. Walters*, 110—251.

The measure of compensation in case of repudiation by vendor is the enhanced value of the property and not the cost of the improvements. *Wetherell v. Gorman*, 74—603; *Daniel v. Crumpler*, 75—184; *North v. Bunn*, 128—196.

Conflict of laws.—If a contract is made in a foreign State, not required by the law there to be in writing, but so required in this State, it can not be enforced in this State because proof in writing is necessary. *McGee v. Blankenship*, 95—563; 64 *L. R. A.*, 119.

The Statute of Frauds does not include:

1. Executed contracts. *Choat v. Wright*, 13—289; *Mushat v. Brevard*, 15—73; *Eppes v. McLemore*, 14—345; *White v. White*, 20—563; *Reeves v. Edwards*, 47—457; *Hall v. Fisher*, 126—205; *McManus v. Tarleton*, 126—790; *Brinkley v. Brinkley*, 128—503; *Smith v. Arthur*, 110—400; *Satterfield v. Kindley*, 144—455, 15 *L. R. A.* (N. S.), 399, 12 *Ann. Cas.*, 1098; *Rogers v. Lumber Co.*, 154—108; *Manning v. Foster*, 49 *Wash.*, 541, 96 *Pac.*, 233, 18 *L. R. A.* (N. S.), 337; 20 *Cyc.*, 302; *St. of Frds.*, *Cent. Dig.*, secs. 295, 334; *Dec. Dig.*, sec. 139.

2. Contracts created by law. This applies to quasi contracts where the law implies the obligation; and to sales made by the sheriff under execution. *Tate v. Greenlee*, 15—149; or to sales under order of court. *Trice v. Pratt*, 21—626; *Atty.-Gen. v. Nav. Co.*, 85—411; *In re Dickerson*, 111—114.

3. Obligations arising from special statute. As in case of the claims of subcontractors, etc. *Revisal*, sec. 2019.

Contracts required to be in writing in North Carolina:

1. Bills of exchange and promissory notes. *Revisal*, sec. 2151. *McArthur v. McLeod*, 51—475; and may be written in pencil, *Gudger v. Fletcher*, 29—372.

2. Acceptance of bill of exchange or order for the payment of money. *Revisal*, secs. 2882-2885. Formerly written acceptance was not necessary. *Short v. Blount*, 99—49.

3. Assignment of copyright or patent. Under U. S. Statute, *Rev. Stat.*, secs. 4898, 4955.

4. New promise or acknowledgment of a debt barred by the Statute of Limitations. *Revisal*, sec. 371; *Clark's Code*, sec. 172, and cases cited.

5. Promise to pay a debt after a discharge in bankruptcy. *Revisal*, sec. 978. Verbal promise was sufficient before the act of 1899. *Hornthal v. McRae*, 67—21; *Fraley v. Kelly*, 67—78; *Ibid*, 79—348; *Kull v. Farmer*, 78—339; *Shaw v. Burney*, 86—331.

6. Limited partnership contracts are required to be in writing and registered. *Revisal*, sec. 2523. *Davis v. Sanderlin*, 119—84.

7. Certain contracts of married women, requiring written consent of husband. Revisal, secs. 2094, 2096, 2107.

8. All contracts with Cherokee Indians, where the amount is over \$10. Revisal, sec. 975. *Lovingood v. Smith*, 52—601.

9. Sale of liquor by retail on credit over \$10. Revisal, sec. 977. *Covington v. Threadgill*, 88—186.

10. Promise to bind executor, etc., personally. See above.

11. Promise to pay the debt of another. See above.

12. Conveyances of land and contracts to convey. See above.

13. Leases for more than three years, and all mining leases.

14. Agricultural liens. Revisal, sec. 2052; *Patapsco v. Magee*, 86—350; *Odom v. Clark*, 146—544.

Conditional sales, Revisal, 983; chattel mortgages, Revisal, 1039-1041; are valid between the parties without writing, but are required to be in writing for registration as against third persons. *White v. Carroll*, 146—230; *Roberts v. Hudson*, 158—210.

Insurance contracts are not required to be in writing, though Revisal, 4759, requires a certain form of policy. *Floare v. Ins. Co.*, 144—232.

The promise of an infant to ratify a contract after coming of age need not be in writing. See *post*, Infants' contracts.

Corporations were required by The Code, 683, to make contracts in writing if the amount was over \$100; but that has been repealed. The same rules as under the Statute of Frauds applied. *Kenner v. Mfg. Co.*, 91—421; *Cozart v. Land Co.*, 113—294; *Rumbough v. Improvement Co.*, 106—461. It did not apply to foreign corporations. *Curtis v. Piedmont Co.*, 109—401; nor to executed contracts. *Roberts v. Woodworking Co.*, 111—432; *Luttrell v. Martin*, 112—593; *Clowe v. Pine Product Co.*, 114—304. The contract being void under the statute, could not be ratified after its repeal. *Spence v. Cotton Mills*, 115—210; *Jenkins v. Mfg. Co.*, 115—535; *Mordecai's Law Lectures*, 986.

CHAPTER V.

CONSIDERATION.

Sec. 1. What constitutes a consideration.

1. Valuable consideration.

(66) LEAKSVILLE-SPRAY INSTITUTE v. MEBANE,
165 N. C., 644, 81 S. E., 1020—1914.

This was an action to recover a sum of money upon the following writing: "On sixty days demand, I will pay to the order of D. F. King, Dr. John Sweaney, and B. F. Ivey, \$1,500 (one thousand five hundred dollars), said parties to dispose of this amount in connection with the Leaksville-Spray Institute in any way they may see fit. (Signed) B. Frank Mebane.

"Payable at the Bank of Spray, N. C."

The plaintiff King, the defendant Mebane and others were seeking to establish the Spray School of Technology, and in doing so it was thought desirable to purchase the Leaksville-Spray Institute and the Leaksville Furniture Factory, in both of which King owned stock. Part of the furniture company stock was purchased by the defendant or by the American Warehouse Co., when a question arose as to whether this property was to be used for the benefit of the school, and King refused to sell his stock until this was settled. Thereupon the defendant executed this paper, and King and others sold him their stock. The principal defense was that there was no consideration for this promise to pay.

The court instructed the jury: "That a valuable consideration consists either in some right, interest, benefit, or profit accruing to the party who makes the payment, or some forbearance, detriment, loss or responsibility, act or service given, suffered or undertaken by the other to whom it is made.

"In order to support the contract, it is not required that the consideration shall be for the full value of the sum named in the contract, or for full value of the property passed. Mere inadequacy of consideration will not avoid a contract, in the absence of fraud, where a contract is legally sufficient on its face; and so full value was not required to support the simple promise, but it must be of some value. . . .

"If you should find from the evidence in this case that the de-

fendant desired to purchase stock of D. F. King and others in the furniture factory, that King and others refused to sell this stock to the defendant unless he would execute the note sued on, and in order to accomplish the purchase of this stock the defendant was required to execute the note, and that this stock was of some value, then there was a sufficient consideration for the note."

There was a judgment for the plaintiff, and the defendant appealed. Affirmed.

ALLEN, J. The authorities fully support the charge of His Honor. *Brown v. Ray*, 32 N. C., 73, 51 Am. Dec., 379; *Faust v. Faust*, 144 N. C., 386, 57 S. E., 22; *Kirkman v. Hodgins*, 151 N. C., 591, 66 S. E., 616. In the first of these cases, *Pearson, C. J.*, said:

"To make a consideration, it is not necessary that the person making the promise should receive or expect to receive any benefit. It is sufficient if the other party be subjected to loss or inconvenience. A trust or confidence reposed, by reason of an undertaking to do an act, is held to be a sufficient consideration to support an action on the promise."

—and this was approved in the last case cited.

In 9 Cyc., 312, the author cites many authorities to support the position that:

"There is a consideration if the promisee in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has the right to do, whether there is any actual loss or detriment to him, or actual benefit to the promisor or not."

In *Hamer v. Sidway*, 124 N. Y., 538, 27 N. E., 256, 12 L. R. A., 463, 21 Am. St. Rep., 693, the court applied this principle to a contract to refrain from the use of tobacco and intoxicating liquors, and said:

"The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that, unless the promisor was benefited, the contract was without consideration, a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined consideration as follows: 'A valuable consideration in the sense of the law may consist either in some right, interest,

profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other.' Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him.' Anson on Contracts, 63. 'In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' Parsons on Contracts, 444. 'Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.' 2 Kent's Com. (18th Ed.), 465. Pollock, in his work on Contracts, page 166, after citing the definition given by the exchequer chamber already quoted, says: 'The second branch of this judicial description is really the most important one. Consideration means, not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promise of the first.'" *Hamer v. Sidway*, 124 N. Y., 538, 27 N. E., 256, 12 L. R. A., 463, 21 Am. St. Rep., 693.

Applying these principles, there can be no doubt that there was evidence of a consideration sufficient to support the promise of the defendant, as the plaintiff testified that he refused to sell his stock in the furniture company except upon condition that the defendant executed the paper declared on in the complaint. . . .

The fact that King was benefited by the sale of his stock, if shown to be true, would not destroy the consideration for the promise of the defendant, because the consideration consists in yielding the legal right to retain the stock, and to impose the conditions upon which he would sell. . . .

It appears to us from the record that the defendant has not been seeking profit or advantage for himself, and that he has been actuated by high public motives, but there is evidence to support the verdict, and we can not disturb it.

No error.

A consideration is that which moves from the promisee to the promisor as the basis of his promise. While the definition generally gives it as "a benefit to the promisor or a loss or detriment to the promisee," the loss or detriment is the important feature. It is immaterial that the promisor is not benefited, if the promisee has parted with some right which in law he could exercise. *Pollock Cont.*, 167; *Bank v. Bridgers*, 98—67, 2 A. S. R., 317; *Devecmon v. Shaw*, 69 Md., 199, 9 A. S. R., 422; *Freeman v. Morris*, 131 Wis., 216, 109 N. W., 983, 11 Ann. Cas., 482; 6 R. C. L., 654; *Contracts*, Cent. Dig., sec. 248.

A contract for any valuable consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and if it be of a sufficient adequate value, is never set aside in equity; for the person contracted with has then given an

equivalent to recompense, and is therefore as much an owner, or a creditor, as any other person. 2 Blk., 444.

Sufficient Consideration.—It is only necessary that there should be either a gain or benefit to the promisor, or a loss, injury or detriment to the promisee. So where A sold a slave to B, and B put handcuffs on the slave, then A promised to pay B \$100 if he would take the handcuffs off and the slave should escape; B took the handcuffs off and the slave escaped; A was liable on his promise, but he should have been notified of the escape. *Weatherly v. Miller*, 47—166. A was about to buy B's land, but being undecided, C promised to pay him \$100 if he would buy the land, in order to get rid of B as a neighbor; A bought the land, and C's promise was sustained. *Little v. McCarter*, 89—233. A promise to guarantee the purchaser against loss for 5 percent of the profits on a resale of the land, is sufficient. *Shelton v. Reynolds*, 111—525. A promise by the vendor to repay a part of the purchase-money, if the vendee will have the land surveyed and there is a deficiency in the number of acres. *Sherrill v. Hagan*, 92—345. The sale and conveyance of a tract of land is sufficient consideration for a promise to pay for improvements. *Manning v. Jones*, 44—368; or to pay part of the proceeds from the sale of the mineral interest. *Michael v. Foil*, 100—178. See also *Bourne v. Sherrill*, 143—387. The defendant was induced by fraud to execute a bill of sale for certain property, and then refused to give it up; the consideration was the endorsement of a bond to the defendant with the name of the surety erased; this was valid consideration, though the validity of the bond may have been affected by the alteration, because the plaintiff had a right to keep it. The fraud being in the consideration and not in the *factum*, could only be inquired into in equity. *Gwyn v. Hodge*, 49—168; but under the present practice it could be investigated. *Hughes v. Boone*, 102—137. The assignment of a judgment is a sufficient consideration for a promise to pay one-third of the amount of the judgment, whether it is collected or not. *Winberry v. Koonce*, 83—351; *post*, 196. An agreement to support two deaf and dumb brothers is a valuable consideration in a deed from a father to a son. *Worthy v. Brady*, 91—265.

A and B were members of a corporation; A conveyed land to the corporation on the agreement that one-fourth was to be paid for in cash or personal notes of the members, and the balance secured by a mortgage by the corporation; the corporation was also to give its note and issue stock to the members for the amounts so paid or secured by them, and this was done; B gave his note for part of the price and was held liable in an action by A. *Johnson v. Rodeger*, 119—446. A sold goods to B, an infant, upon his promise to pay certain debts of A; this was a valuable consideration, though the promise of the infant was voidable. *Hislop v. Hoover*, 68—141. A wrote to B, "Let M see statement of my account, and give him any money due me"; M presented this and B promised to pay the amount due, but afterwards refused; the promise was binding. *Brem v. Covington*, 104—587. A promise to devise land, based upon sufficient consideration, may be enforced. *East v. Dolihite*, 72—562; *Price v. Price*, 133—494. An agreement to arbitrate can not be set up as a defense, but may be a cause of action for breach. *Carpenter v. Tucker*, 98—316.

In dealings during the Civil War, Confederate Treasury notes were sufficient consideration. *Kingsbury v. Lyon*, 64—128; *Phillips v. Hooker*, 62—193. A Confederate bond was given in payment of a debt, and the assignor promised that if the transfer was not valid he would make it so or pay \$10,000; the promise was absolute and could be enforced. *Bryan v. Heck*, 67—322. A railroad company can make a valid agreement fixing the value of property in case of loss, but it must be reasonable and based on a valuable consideration. *Gardner v. R. R.*, 127—293. The word "sold" in a deed *ex vi termini* imports a valuable consideration, to rebut the presumption of a resulting trust. *Reves v. Copper Co.*, 74—593. A valuable consideration is money or money's worth. *Jackson v. Hampton*, 30—477; *Springs v. Hanks*, 27—30.

On valuable consideration generally, see 1 Page Cont., secs. 274-278; sec. 282 *et seq.*; Harriman Cont., pp. 33-79; 9 Cyc., 308 *et seq.*; 1 Parsons Cont., 466 *et seq.*; 6 Am. & Eng. Encyc., 673, 677; Clark Cont., 106; Mordecai's Lectures, 694.

Insufficient Consideration—Nudum Pactum.—In the Roman law a *nudum pactum* was so called to distinguish it from *pactum verbis prescriptis vestitum*. 1 Parsons Cont., p. 463. A promise by an attorney, during the pendency of a suit, to indemnify his client against loss is *nudum pactum*. Mitchell v. Bell, 1—157. A promise by a daughter to reconvey land to her father which he had conveyed to her is without consideration. Ray v. Wilcoxon, 107—514. A gave B an order on C for \$.; B failed to present it to C, but afterwards asked A to pay it; A said "produce the paper and I will pay it"; B took the paper out of his pocket, and A refused to pay it; the first promise of A was conditional, and the second was without consideration. Brown v. Teague, 52—573. A sold property belonging to the wife in the lifetime of the husband, and after the husband's death gave his note to the wife for the money; the note was without consideration, as the money belonged to the husband's estate. Bryan v. Philpot, 25—467. (Under the present law the note would be valid.)

A leased land to K for 4,800 pounds of cotton, and made advances to the amount of 1,600 pounds more; K paid all but 580 pounds, and then delivered six bales to F; F asked A to allow him to pay the money to K and A consented, but before it was paid withdrew his consent and refused to waive his lien; his promise was without consideration and could be revoked at any time before acted on. Sugg v. Farrar, 107—123. A was the owner of a rice-mill and had a "turn of rice," 1,500 bushels, at his mill; he agreed to let his customer have it, but no particular inducement or other explanation was shown; the promise was *nudum pactum*. Ashe v. DeRosset, 53—240. A contracted to build a house for B, and before it was finished sold his interest in it to C; C's promise was *nudum pactum*. Johnson v. Carson, 12—80. A agreed with B that if the referees in an arbitration intended to allow a certain credit, it should be credited on B's note; B offered to show in a suit that the arbitrators intended to allow it but omitted it; A's promise was without consideration. Patton v. Garret, 116—847. Where the town located a deep-water line for a wharf, and A obtained a grant recognizing that line, but the location was incorrect, there was no consideration for A's waiver of his right to have it properly located. Wool v. Edenton, 117—1. A sold to B property belonging to C without C's consent; afterwards C ratified the sale, then tried to hold A for the amount. After ratification A's promise to pay was *nudum pactum*. Rowland v. Barnes, 81—234.

2. Consideration and motive.

(67) JOHNSON, Admr., v. JOHNSON,

10 N. C., 556—1825.

Action of *assumpsit* on a promissory note of defendant payable to plaintiff's intestate.

On the trial the question was whether the defendant, who was the son of the intestate, had been discharged from the payment of the note. For the purpose of showing this, the defendant offered evidence that the intestate, just before his death, said to a witness specially called by him, that the defendant should never pay any part of the amount of the note, for he was an industrious man and would take care of what he had. This evidence was objected to,

but was received by the court. There was further evidence that the intestate had said that he had induced the defendant to purchase the tract of land, to pay for which the money secured by the note was loaned, by which purchase he had embarrassed himself; that he had received of defendant some pork, flour and beef; that the defendant had rendered him many valuable services; that he had brought the defendant's negro blacksmith to Warrenton against the wishes of defendant, where he died; and that, therefore, the defendant should not pay any part of the money. The note was found among the intestate's papers after his death, with several credits for interest and part of the principal endorsed.

The Judge instructed the jury that a mere declaration by the intestate that the defendant should not pay the money due on the note, unless accompanied with destruction of the note, would not discharge the defendant; but if they found the facts to be that the intestate had induced the defendant to purchase the land mentioned and thereby involved him; that the intestate had received the money, flour, pork and beef of the defendant, and the defendant had rendered to him valuable services, and that he had brought the defendant's blacksmith to town against his wishes, where he died; and that the intestate, in consideration thereof, declared that the defendant should not pay the note, the defendant would thereby be discharged.

There was a verdict and judgment for the defendant, and plaintiff appealed.

TAYLOR, C. J. It is very evident that the testator's having said that the defendant should never pay any part of the note was not obligatory on him, unless it was founded on a consideration yielding a benefit to him, or attended with trouble or prejudice to the defendant. The motives inducing him to make this declaration are of different characters and should have been discriminated to the jury according to their legal operation. The testator's having induced the defendant to purchase the land by which he became involved does not form a valid consideration; for understanding it as proceeding from advice honestly given, although the event might have been unfortunate, he thereby incurred no moral obligation, and such a promise could not become legally obligatory on him. His having brought the defendant's blacksmith to Warrenton against the *wishes* of his master is subject to the same construction, for the testator must be understood, from the statement of the evidence, to have acted according to the best of his judgment for the defendant's interest, and as it does not appear that it was done against the consent of the owner, the accident of the negro's death could not make the testator liable either in law or conscience. The promise not to require payment of the note, so far as it was

founded on these two considerations, was perfectly gratuitous and could only be enforced by applying to the feelings and bounty of the testator, but could in no view be made the subject of an action. But he further acknowledged that the defendant had rendered him many valuable services and had delivered him various articles of produce. These would form the proper subject of a set-off could their amount be ascertained. May not the credit on the note have been in part for them? That these alone did not, in the testator's opinion, amount to a full payment of the note seems certain from his adding the other motives to them. The true inquiry for the jury to have made was whether the note had been paid off in whole or in part, or whether the testator had promised that he would not require payment on such considerations as were valid in law. The first was plainly a question of fact; and on the latter the jury should have been instructed that all the considerations were insufficient, except the produce delivered and the services performed. In this opinion the other Judges concurred.

Judgment reversed.

The consideration and the purpose or motive are not the same thing. The consideration is the immediate present compensation which the grantor receives, be it real or nominal, and which is necessary in a deed of bargain and sale to raise a use; the motive is the remote purpose which the grantor had in mind and which is manifested by the uses and trusts declared. *Morris v. Pearson*, 79—253.

See also 1 Page Cont., sec. 275; *Clark Cont.*, 103; *Little v. McCarter*, 89—233; *Philpot v. Gruninger*, 14 Wall, 570; 6 R. C. L., 653.

3. Good consideration.

(68) *BLOUNT v. BLOUNT*,

4 N. C., 389—1815.

This is an action of trespass *q. c. f.*, in which the jury found a verdict for the plaintiff, subject to the opinion of the court on the sufficiency of a deed.

The plaintiff claimed as heir-at-law of Levi Blount, and the defendant claimed under Judith Whidbie, to whom Levi Blount had executed a deed, with the expression "as well for and in consideration of the natural love and affection which he hath for and beareth unto the said Judith Whidbie, his natural born daughter, as for the better maintenance, etc., of said Judith Whidbie."

TAYLOR, C. J. The question arising upon this record is, whether the deed relied upon by the defendant is sufficient in law to convey the title from Levi Blount. The distinction between a deed and a parol contract is well settled at common law, and upon the basis of sense and justice. The inconsiderate manner in which words frequently pass from men, would often betray them into acts of

imprudence, and not unfrequently expose them to the artifices of fraud, were they not placed under the safeguard of that rule, which denies validity to a parol contract, unsupported by a consideration. On the other hand, the ceremonies which accompany a deed imply reflection and care, and serve to enable a man to avoid either surprise or imposition.

This rule was changed only when Chancery assumed jurisdiction of uses, when they acted upon the maxim of the civil law, *ex nudo pacto non oritur actio*, and would not carry a deed into execution which was not supported by a consideration.

Lord Bacon, in his reading on the statute of uses, remarks, "They say that a use is but a nimble and light thing and now contrawise, it seemeth to be weightier than anything else, for you can not weigh it up to raise it, neither by deed, nor by deed enrolled without the weight of a consideration. But you shall never find a reason of this to the world's end in the law; but it is a reason of Chancery, and it is this: that no court of conscience will enforce *donum gratuitum*, though the intent appear never so clearly, where it is not executed or sufficiently passed by law; but if money have been paid and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chancery."

Of common law conveyances it is necessary to notice only a feoffment, and it is very clear that this deed can not operate as such. Because the case does not state that Levi Blount was in possession, nor that he gave livery of seisin; and if the deed were in all other respects formally in feoffment, the mere signing and sealing such a deed was, in no instance, sufficient to transfer an estate of freehold, unless the possession was delivered from the feoffer to the feoffee, and without which a deed of feoffment only passed an estate at will. 1 Co. Lit., 43a. The livery of seisin is the delivery of actual possession; and therefore can not be made by a person who has not at the moment actual possession. Consequently, if a person make a feoffment of lands which are let at lease, he must obtain the assent of the lessee to the livery. The old practice was for the lessee to give up the possession for a moment to the lessor, in order to enable him to give the livery. *Betterworth's case*, 2 Rep., 31.

It is next to be inquired whether the deed can operate under the statute of uses, the effect of which is to impart efficacy to certain conveyances without a transmutation of possession.

A bargain and sale is a contract by which a person conveys his land to another for a pecuniary consideration; whence a use arises for the bargainee, and the statute immediately transfers the legal estate and possession to him without any entry or other act on his

part. For want of a pecuniary consideration, then, it is perfectly clear that this deed can not operate as a bargain and sale.

Nor can it operate as a covenant to stand seized to uses, because it is essential to this sort of conveyance, that the consideration be either affection to a near relation or marriage. The love and affection which a man is supposed to bear to his brothers and sisters, nephews and nieces, and heirs-at-law, as well as the natural desire of preserving his name and family, all form good considerations.

There is an implied obligation subsisting between parent and children, who are considered in equity as creditors, claiming a debt arising from the duty a parent is under to provide for them. But love and affection to an illegitimate child is not a sufficient consideration to raise a use in a covenant to stand seized.

Where a person covenanted in consideration of natural love and affection, to stand seized to the use of himself for life, remainder to A, his reputed son (who was illegitimate), for life, etc., and also covenanted to levy a fine or make a feoffment for further assurance, and he afterwards made a feoffment in fee to the covenantees, in performance of his covenant to the same uses, it was resolved that no use arose to A, the bastard, by the covenant, for want of a consideration. Nor could he take anything by the feoffment, it being only made for further assurance. Dyer, 364, p. 16.

This case is expressly in point, and its authority is unquestionable; wherefore, there must be a judgment for the plaintiff.

A good consideration is such as that of blood, or of natural love and affection, where a man grants an estate to a near relative, being founded on motives of generosity, prudence and natural duty. 2 Blk., 297. Relationship by blood or marriage is a good consideration and is sufficient in a covenant to stand seized to uses. Hatch v. Thompson, 14—411; Egerton v. Carr, 94—648. As distinguished from the case given, a conveyance by the mother to an illegitimate child is good, for such child may by our statute inherit from her. Ivey v. Granberry, 66—p. 228. An executory agreement in consideration of marriage, where the parties covenant to make provision for the illegitimate child of the wife, will be enforced. Kimbrough v. Davis, 16—71.

See 1 Page Cont., sec. 272; Clark Cont., 108; 6 Am. & Eng. Encyc., 679, 683; Mordecai's Lectures, 694; Powell v. Morisey, 98—426; Fink v. Cox, 18 Johns., 145, 9 A. D., 191; Sullivan v. Sullivan, 122 Ky., 707, 92 S. W., 966, 7 L. R. A. (N. S.), 156, 13 Ann. Cas., 163; 6 R. C. L., 653.

4. Moral obligation.

(69) HATCHELL v. ODOM, Admr.,

19 N. C., 302—1837.

This was an action of *assumpsit* upon the following facts:

The plaintiff, being about to move to the West, purchased a slave of defendant's intestate for \$584; it did not appear that there was any warranty of soundness, nor that the intestate had

fraudulently represented the slave to be sound. After the plaintiff had commenced his journey, the negro failed in walking from a *caries* of the bone of one of his legs; upon which the plaintiff sent him back to one Vaughan, his agent, to be returned to the intestate. When informed of these facts, the intestate desired Vaughan to return the negro to him, and promised that he would either cure, or have him cured, or would otherwise return the price. Vaughan sent the slave to the intestate, who placed him under the care of a physician. It was proved that the disease very seriously affected the value of the slave; that after an operation, nature sometimes effected a cure, but such a result was unusual, and not expected. The negro was returned to the intestate in May, 1836, and the action was brought in November following, the intestate having died in the meantime.

Counsel for defendant moved for nonsuit, because the promise upon which the action was brought, was without consideration, but the court denied the motion. The counsel then asked the court to instruct the jury that no breach was shown, because sufficient time had not elapsed to effect a cure or to show that the disease was incurable, and this was refused. His Honor instructed the jury that the intestate was entitled to a reasonable time to effect a cure; that if he neglected to attempt it, or attempting it failed to succeed, and gave up the attempt as hopeless, or if the disease turned out to be incurable, a reasonable time having elapsed for a cure, then the plaintiff would be entitled to a verdict.

There was a general verdict for the plaintiff, and defendant appealed.

GASTON, J. . . . The point mainly relied on, in the argument by the plaintiff's counsel, was, that the intestate was under a moral obligation to reimburse the plaintiff and this obligation constituted a sufficient consideration to make the intestate's promise binding in law. It was not contended that he was under a legal obligation to make reimbursement; for the sale having been without warranty and without fraud, the vendee was bound in law to bear the losses arising from defects in the thing sold. *Erwin v. Maxwell*, 7 N. C., 241. But it was insisted that no man could keep, with a safe conscience, the price of an article sold as valuable and afterwards found to be worthless; and that although the law, while the obligation to make restitution rests only in conscience, can not interpose to compel performance of the duty, yet it will gladly seize on a promise to perform it, and uphold it as binding. It is always gratifying in the administration of the law to behold it enforcing the precepts of natural justice; but it can not successfully undertake to compel the performance of *all* of them, even on those who have expressly assumed to perform them. There are many duties

to our fellow men, which an enlightened conscience recognizes, that are either too refined to be discerned, too indefinite to be prescribed, or too imperfect to be enforced, by human institutions, or which are regulated by a standard of morals too high to be applied as an ordinary instrument for measuring legal obligations. Those duties which are plain, definite and positive, and which can be practically enforced in the business life, are recognized as legal obligations, and undertaking to perform them is raised through the fiction of an implied promise. There is, however, a class of cases, where, although the moral obligation may be plain and perfect, and ordinarily a proper subject for legal enforcement, yet its performance can not be compelled, because of some rule of public policy, and where therefore the law will not imply a promise. If, however, in these cases a promise be afterwards made, when the interdict shall have been removed, so that allowing legal validity to the promise will not conflict with the rule, there is no longer a difficulty in enforcing it. Thus it is a clear moral obligation to return money which has been borrowed; and in general the law compels the performance of the duty. From principles of public policy, however, it will not enforce such an obligation against a *feme covert* or an infant, because it denies to the one the legal capacity to contract, and allows it to the other only to a very limited extent. But if, after the *feme covert* becomes a widow and the infant attains full age, they distinctly and unequivocally promise to pay what they would have been bound to pay but for the protecting and disabling rule of law, the promise is regarded as binding as it would have been had there been no such rule. In these cases the express promise gives an original cause of action, although there never was an antecedent legal obligation; not merely because there was a former moral obligation, but because there was a former moral obligation which would have had legal efficacy but for temporary causes removed before the new promise was made. So if a certificated bankrupt, or one set at liberty after being taken by a *ca. sa.*, promise to pay his former creditor, or a debtor promise to pay a debt, the recovery of which is barred by the statute of limitations, the law will compel the performance of the promise, founded on the former obligation, because it was once a complete legal obligation, and it is distinctly and unequivocally reassumed, when there is no rule of legal policy to forbid it. But it is believed that a promise, however express, must be regarded as *nudum pactum*, and not binding in law, if founded solely on considerations which the law holds altogether insufficient to *create* a legal obligation; and from which, therefore, it refuses to raise the *inference* of a promise against any person. (See note to 3 Bos. & Pul., p. 249, and the cases there collected.) The result of all the

cases as summed up in the note referred to, is, "an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." This summary expresses the rule, we think, with as much precision as can be expected on a subject, where there is an excess of nice learning, and upon which there have been many decisions which it is difficult to reconcile with each other. It has been adopted, we see, with approbation in the Supreme Court of New York, in a case analogous to the present—that of *Smith v. Ware*, 13 Johns., 257.

If we dismiss, as not constituting a sufficient consideration for the promise of the intestate, the supposed moral obligation incumbent on him to remunerate the plaintiff for his unexpected loss, we can see in neither count of the declaration any other matters averred constituting such a consideration. This is not an action to recover damages for an injury done to the plaintiff's property. It is not an action on mutual promises, but simply to recover a sum of money promised to be paid under certain circumstances; that is, if a cure was not effected. Now, in such an action, it is certainly the general principle, and we are not aware of any exception embracing the case before us, that the consideration necessary to support the promise must be some act or omission beneficial to the defendant (or accruing to a third person at the defendant's request) or prejudicial to the plaintiff. *Johnson v. Johnson*, 10 N. C., 556.

No benefit has resulted to the defendant's intestate from being permitted by the plaintiff to incur the expense and trouble of endeavoring to cure the plaintiff's slave. No inconvenience or prejudice has been occasioned to the plaintiff. The slave has not been injured—it is averred only that he has not been cured. No loss of service is charged or can be presumed, for the declaration avers that the slave was worthless when the plaintiff put the slave into the hands of the defendant's intestate to be cured, and continues worthless.

Whatever, therefore, might be the character, in *foro conscientiae*, of the intestate's promise, in law it was without consideration and void. It is the opinion of this court that the judgment rendered below must be reversed, with costs to the appellant in this court; and that judgment on the verdict must be arrested.

Per Curiam.

Judgment reversed.

On moral obligation as consideration, see, *Eastwood v. Kenyon*, 11 Ad. & E., 438, 6 E. R. C., 23; *Lee v. Muggeridge*, 5 Taunton, 36, 1

E. C. L. R., 32; Cook v. Bradley, 7 Conn., 57, 18 A. D., 79; Mills v. Wyman, 3 Pick., 207; Shepard v. Rhodes, 7 R. I., 470, 84 A. D., 573; Trimble v. Rudy, 22 Ky., 1406, 60 S. W., 650, 53 L. R. A., 353; Muir v. Kane, 55 Wash., 131, 104 Pac., 153, 26 L. R. A., (N. S.), 519; Ferguson v. Harris, 39 S. C., 323, 39 A. S. R., 731; 6 R. C. L., 667.

See also 1 Page Cont., sec. 320; Clark Cont., 109; 6 Am. & Eng. Encyc., 679, and notes. See also Past Consideration, *post*. The cases there cited show that the promise of a married woman, void during coverture, will not be sufficient consideration to support a new promise.

Sec. 2. Necessity for consideration.

1. Simple contracts.

(70) JONES v. HOLLIDAY,

11 Tex., 412, 62 A. D., 487—1854.

Action by Holliday against Jones on the acceptance of the following order, alleging that it was given for a valuable consideration: "Mr. Jesse Jones. Please deliver to Mr. Holliday fifteen bales of cotton, weighing five hundred pounds each, by the first of November, and oblige Randolph Foster. September 26, 1851. Accepted. J. Jones." The defendant demurred to the petition because it did not allege in what the consideration consisted, but the demurrer was overruled.

WHEELER, J. The question is, whether to entitle the plaintiff to recover, it was necessary for him to aver and prove a consideration for the order on which the suit was brought. A consideration is essential to the validity of a simple contract, whether it be verbal or in writing. This rule applies to all contracts not under seal, with the exception of bills of exchange and negotiable notes, after they have been negotiated and passed into the hands of an innocent indorsee. 2 Kent's Com. (5th Ed.), 464. In contracts under seal, a consideration is implied in the solemnity of the instrument. And bills of exchange and promissory notes are of themselves *prima facie* evidence of a consideration, and in this respect are distinguished from all other parol contracts. *Mandeville v. Welch*, 5 Wheat., 277. As to all other contracts, if the consideration be not expressed or admitted in the writing, it must be proved. *Arms v. Ashley*, 4 Pick., 71; *Tingley v. Cutler*, 7 Conn., 291. All contracts are by the law distinguished into agreements by specialty and agreements by parol. If they be merely written and not specialties, they are parol contracts, and a consideration must be proved. *Rann v. Hughes*, 7 T. R., 350, note a; *People v. Shall*, 9 Cow., 778; *Burnet v. Bisco*, 4 Johns., 235; *Thacher v. Dinsmore*, 5 Mass., 301, 4 A. D., 61; *Brown v. Adams*, 1 Stew., 51, 18 A. D., 36; *Beverleys v. Holmes*, 4 Munf., 95.

It has been held that an admission in a contract in writing that

it was made for a valuable consideration is *prima facie* evidence of a sufficient consideration to support it. *Wyatt v. Ribb*, 16 Me., 394.

In the present case, however, the writing contains no such admission. Had it been expressed to be for value received, that might have been held, as an admission, sufficient evidence of a consideration to support the judgment. . . .

In declaring upon such a contract, the rule under the common-law system of pleading is that the consideration upon which it is founded must be stated, and must appear to be legally sufficient to support the promise for the breach of which the action is brought. The declaration must disclose a consideration, or the promise will appear to be a *nudum pactum*, and the declaration will consequently be insufficient. 1 Ch. Pl., 321; *Douglass v. Davis*, 2 McCord, 218; *Powell v. Brown*, 3 Johns., 100; *Burnet v. Bisco*, 4 *Id.*, 235; *Bailey v. Freeman*, *Id.*, 280. On principle, the same specialty would seem to be required by the rules of pleading which we have adopted. . . .

Reversed.

2. Contracts under seal.

WALKER v. WALKER,

Ante (40).

Nudum pactum applies only to simple contracts. Deeds need no consideration except under the statute of uses and as against creditors and purchasers for value. *Harrell v. Watson*, 63—454; *Salms v. Martin*, 63—608; *Mosely v. Mosely*, 87—69; *Love v. Harbin*, 87—249; *Ivey v. Granberry*, 66—223; *Howard v. Turner*, 125—107; *Springs v. Hanks*, 27—30; *Hogan v. Strayhorn*, 65—279; *Morris v. Pearson*, 79—253. An exception to the rule that contracts under seal need no consideration is given in contracts in restraint of trade. *Clark Cont.*, 59. This seems to be based upon the idea that the restraint is only incidental to the contract by which the other party acquires an interest in the business to be protected, and its enforcement does not depend upon the mere pecuniary consideration, but upon all the circumstances of the case. 7 *Am. & Eng. Encyc.*, 93; 24 *Ibid.*, 852, 853; 6 *R. C. L.*, 680; *Mitchell v. Reynolds*, 1 *P. Wms.*, 181, 1 *Smith, L. C.*, 70, 92 *A. D.*, 754, and note. In some States the common law effect of a seal has been abolished, and in others the seal is made presumptive evidence of a consideration. 6 *R. C. L.*, 652.

(71) WOODALL v. PREVATT,

45 N. C., 199—1853.

This was a bill in equity, which stated that on August 1, 1851, the defendant, brother of plaintiff's wife, executed his note under seal, and delivered the same to the plaintiff's wife, by which he promised to pay the plaintiff the sum of \$250; that afterwards, and before any part of said money had been paid, the defendant fraudulently availing himself of his influence over the plaintiff's

wife, persuaded her to deliver the bond to him, and that she did so, without the plaintiff's knowledge or consent; that the bond has thus been lost or destroyed, and that the defendant refuses to re-deliver the same, or another for a like amount. The bill prays that defendant be compelled to pay the amount. The defendant admits making the bond and avers that it was made for a certain scheme well known to the parties, which scheme had failed, and the bond was given up in accordance with their plan and with the knowledge of the plaintiff.

PEARSON, J. (after referring to the pleadings). The case was made to depend upon the sufficiency of the bill; and Mr. Strange, the counsel for the plaintiff, was called upon to support the proposition that a bill to enforce the collection of a bond need not contain an allegation of a consideration, either good or valuable. For the bill before us does not allege any consideration, but avers simply that the defendant executed to the plaintiff a bond for \$250, and avoids *on purpose* saying, how or why, or under what circumstances the bond was given; and asks a decree for its payment, on the ground that it is lost or destroyed.

A court of equity never interferes except when the thing is done and a right is vested, so as to entitle the party to have the right protected unless there be a valuable consideration; that is, when the one party has been benefited or the other has suffered a loss, for these are the only cases which affect conscience. Exceptions are made under peculiar circumstances, when there is a natural, or, as it is termed, a good consideration, and in a few instances of meritorious consideration. But these exceptions prove the general rule. To affect the conscience and entitle the party to the aid of a court of equity, there must be an allegation of a consideration. If I give a man a horse, or give him money, the thing is done, and the right of property is vested. But if I promise to give him a horse or to pay him money, and afterwards see proper not to do so, this is no matter which affects conscience unless there be a consideration. It is in the language of the civil law, *nudum pactum*—a *naked* promise. Mr. Strange conceded the general rule, and assumed the position, that while in law a seal imports a valuable consideration which is conclusive, in equity a seal only raises a presumption of a valuable consideration, which may be rebutted. And from thence he inferred that when it is set out in the bill (as in the one under consideration), that the note is under seal, the presumption of a valuable consideration makes an express averment of the fact unnecessary. The expression that "in law, a seal imports a valuable consideration," which is a very common one, is accurate, provided the meaning is properly understood; which is, a seal gives to an instrument the same validity at

law as if there was a consideration. It amounts to, and dispenses with the necessity of the proof of a valuable consideration, because by the rules of the common law everyone is conclusively bound by the solemn act of sealing and delivering a writing as *his deed*. He is thereby estopped, and shall not be heard to say that it did not create a legal obligation. If one seals and delivers a deed of gift of a horse, or a note under seal for the payment of a sum of money, expressing in the face of the writing, that it is not for a valuable or good consideration, but simply on account of friendship, the property passes, and the money may be collected in an action of debt, because a consideration is not necessary to the validity of a deed at common law. *Walker v. Walker*, 35 N. C., 335.

The idea that a seal imports, that is, raises a presumption of payment of a valuable consideration in a court of equity, is not supported by a single case, and it would have been strange if such a case could be found, for the idea is wholly fallacious. A court of equity addresses itself to the conscience of the parties, and of course pays no respect to form, and disregards even the solemn act of sealing and delivering, and looks behind all forms to see if there be a consideration binding the conscience of the parties. What tendency has the mere fact of a seal to prove the payment of a valuable consideration? The inference of the payment of a valuable consideration can be drawn with as much force of reasoning from the fact of the writing, or of the signing, or of the delivery of the paper, as from the fact of its being sealed. But, in truth, neither act raises a presumption of the payment of a valuable consideration, without which a court of equity, except under very peculiar circumstances, never interferes, but leaves the party to such relief as can be obtained at law.

Mr. Strange then insisted that the contract was in the present case executed and the right vested, so that the plaintiff was entitled to the protection of the court, without reference to the consideration; and he suggested this case: One agrees to give his note under seal for \$250, payable in six months, as the price of a horse, which is then delivered to him. The contract, says he, is executed—each party has done all that he agreed to do. That is true, and it would make no sort of difference whether the price of the horse was secured by a note with a seal or without a seal; for the first contract is executed, and the vendor has taken a note of the vendee for the payment of the price at a future day. In other words, there is a second executory contract. It is not necessary to pursue the idea any further. Suffice it to say, the supposed case has no application. For here it is only alleged that the defendant executed to the plaintiff a note under seal for \$250, and we declare

our opinion to be that a court of equity will not aid one who does not allege, and hold himself ready to prove that the note in reference to which he seeks aid (although it may be under seal), was given for a consideration binding upon the conscience of the other party.

(The court then referred to a distinction between bonds and simple contract debts in the settlement of estates, which distinction does not now exist.)

Per Curiam.

Bill dismissed.

A part of the above case has been omitted, because not material to the question now presented.

See also *Scott v. Jones*, 75—112; *Buxly v. Buxton*, 92—479; *Angier v. Howard*, 94—27; *Ducker v. Whitson*, 112—44; *Webster v. Bailey*, 118—193; *Boutten v. R. R.*, 128—337.

3. Negotiable instruments.

(72) CAMPBELL v. McCORMAC,

90 N. C., 491—1884.

This was a civil action upon a promissory note. The complaint alleged that the defendant executed his promissory note to the plaintiff for \$273.33, and that no part thereof had been paid. The defendant demurred because the complaint failed to state facts sufficient to constitute a cause of action, in that it did not allege that the note was given for a consideration either good or valuable. Demurrer was overruled, and the defendant appealed.

ASHE, J. At the common law, promissory notes were not negotiable, but were made so by the statute of 3 and 4 Anne, ch. 9, which was reenacted in this State by the Act of 1762, and that act was amended by the Act of 1786, which declared them to be negotiable, whether expressed to be payable to order or for value received. Rev. Stat., ch. 13, secs. 1, 2; Rev. Code, ch. 13, sec. 1; The Code, sec. 41.

All such notes thus made negotiable import *prima facie* that they are founded upon a valuable consideration; and while such consideration is essential to their support, yet it is not necessary, in an action upon them, for the plaintiff to aver and prove such consideration; yet when evidence has been introduced by the defendant to rebut the presumption which they raise, the burden is thrown upon the plaintiff to satisfy the jury by a preponderance of evidence that there was a consideration.

It was so held in *McArthur v. McLeod*, 51 N. C., 475, where the court says: "Although notes as simple contracts require a consideration, it has long been settled that they import a consideration *prima facie* from the holder, so as to throw the *onus* on the other

side to show the want of a consideration." The same principle is laid down in Story on Promissory Notes, 181, where it is said: "Between the original parties, and *a fortiori* between others who by endorsement or otherwise become *bona fide* holders, it is wholly unnecessary to establish that a promissory note was given upon a consideration; and the burden of proof rests upon the other party to establish the contrary, and to rebut the presumption of validity and value which the law raises for the protection and support of negotiable paper." To the same effect is Daniel on Neg. Inst., sec. 164, and Edwards on Bills, 217.

The demurrer was properly overruled. Let this be certified to the Superior Court of Robeson County that the defendant may answer the complaint, if he shall be advised so to do, otherwise to abide the judgment of the court.

No error.

Affirmed.

At common law a promise without consideration was void; a consideration must have been alleged and shown. The first exception was as to contracts under seal and of record, on account of their form. The next was as to bills of exchange and promissory notes, which were held to be *prima facie* evidence of a consideration. The execution of the note imports a consideration, as does the endorsement. The possession and the introduction of the note in evidence by the endorsee import that he obtained it in due course. When the defendant shows fraud or other defense, the holder must prove adequate consideration in the transfer. *Meadows v. Cozart*, 76—450; *Bank v. Burgwyn*, 108—62; *Tredwell v. Blount*, 86—33; *Applegarth v. Tillery*, 105—407; *Pugh v. Grant*, 86—39; *Bank v. Bridger*, 98—67. An unsealed note, not negotiable in form, given for "value received," furnishes sufficient evidence of consideration. *Stronach v. Bledsoe*, 85—473; but a consideration must be shown when it does not appear in such instrument. *Stamps v. Graves*, 11—102; *Burbage v. Windley*, 108—357; *Conservatory v. Dickinson*, 158—207; *Carnwright v. Gray*, 127 N. Y., 92, 27 N. E., 835, 15 L. R. A., 845; *Ginn v. Dolan*, 81 Ohio St., 121, 90 N. E., 141, 135 A. S. R., 761.

See also 1 Page Cont., sec. 279; Clark Cont., 111; 6 Am. & Eng. Encyc., 763; Mordecai's Lectures, 989; Revisal, 2172.

4. Gratuitous employment.

(73) BROWN v. RAY,

32 N. C., 72, 51 A. D., 379—1849.

This was an action on the case. In March, 1846, the defendant had a crib of corn, containing 1,200 bushels. The sheriff levied on the corn under execution, and sold 600 bushels to different persons, in lots of 100 bushels each, and the plaintiff bought three lots. After the sale the sheriff said that it was his duty to attend to measuring and delivering the corn, but that it was inconvenient for him to do so, and that the defendant would undertake to do this. The defendant consented, and the corn was left in his crib, with the understanding that he would measure and deliver it to the purchasers as they called for it. In July, 1846, the plaintiff

called for his corn and defendant refused to let him have it, and this action was brought.

The court charged the jury, "that to entitle the plaintiff to recover, he must not only prove a promise by the defendant to deliver the corn, but he must also prove a consideration to support the promise." There was a verdict and judgment for the defendant, and the plaintiff appealed.

PEARSON, J. As an abstract proposition, it is true there must be a consideration to support a promise, but to make the charge in this case pertinent it must be understood that the Judge assumed that the evidence did not show a consideration. In this, we think, there was error, for in our opinion the evidence did show a consideration, and the jury should have been so charged. To make a consideration, it is not necessary that the person making the promise should receive or expect to receive any benefit. It is sufficient if the other party be subjected to loss or inconvenience. A trust or confidence reposed, by reason of an undertaking to do an act, is held to be a sufficient consideration to support an action on the promise; as if one voluntarily undertakes to deliver a cask of wine safely at a cellar, although he is to receive no pay for it, an action will lie upon the promise, if he be guilty of negligence, and *a fortiori*, if he retain the wine and refuse to deliver it. *Coggs v. Bernard*, 2 Ray., 909, 919. Lord Holt says: "The owner's trusting him with the goods is a consideration. The taking the trust upon himself is a consideration, though nobody could have compelled him to undertake the trust. As he entered upon it, he must perform it."

So, in this case, nobody could have compelled the defendant to undertake to measure out and deliver the corn, when applied for; but as the trust was reposed in him, and he kept the corn, and undertook to deliver it, he is bound to do so, and is liable to this action for refusing, whether he had used the corn or still had it in his crib. In the language of Lord Holt, "the owner trusted him with the goods, and he entered upon the trust."

But for this promise the plaintiff would have required the sheriff to deliver the corn. This puts the plaintiff to inconvenience, and there is an expressed trust, and an undertaking to do the act. If one undertakes to lead my horse to Statesville, and turns him loose on the road or refuses to deliver him, he is liable, although no compensation was to be given; for he has entered upon the trust, and I have been put to inconvenience by reason of his undertaking.

"The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." *Smith's Leading Cases*, 1, vol., 169; where the ques-

tion is fully discussed in the valuable notes of Mr. Smith, and of the American annotators, Hare and Walker.

Per Curiam. Judgment below reversed, and a *venire de novo* awarded.

To the same effect is *Robinson v. Threadgill*, 35—39; *Bank v. Kenan*, 76—340; *Sprinkle v. Brimm*, 144—401.

A promised to get certain drafts for B's tobacco and credit the amount on a debt which he held against B, and A failed to get the money or the drafts; the court held that A was liable on his promise. "An undertaking to do anything is a sufficient consideration provided it is acted upon, either by the one party's entering upon the trust, or by the other's relying upon him to do so, provided loss is thereby sustained. Here the plaintiff trusted the defendant's promise to get the drafts; but for the promise he would have attended to the business himself." *Watkins v. James*, 50—105. (This seems to go beyond the ordinary rule.)

See 1 Page Cont., sec. 303; 1 Parsons Cont., 448; Clark Cont., 111; *Thorne v. Deas*, 4 John. (N. Y.), 84; 19 Am. & Eng. Encyc., 914.

Sec. 3. Adequacy of consideration.

(74) *SHEPARD v. RHODES*,

7 R. I., 470, 84 A. D., 573—1863.

BULLOCK, J. The count demurred to states, in substance, that the plaintiffs had discharged the defendants from a certain debt then due and owing from them to the plaintiffs, in consideration of dividends to be received from the proceeds of certain effects assigned by the defendants; and that subsequent to such discharge, the defendants, feeling themselves honorably bound to pay to the plaintiffs this debt, in consideration thereof and of one dollar to them paid, made the following new promise, to wit, to pay to the plaintiffs in one year after a final dividend, any difference that might then exist between their full debt and interest and the amount of any dividend or dividends the plaintiffs might have previously received. The count further states that more than one year has elapsed since the plaintiffs received notice that no dividend would be paid them from the assigned effects.

This statement of the cause of action shows, in effect, two separate and distinct considerations as the foundation of the new promise: 1. A moral consideration, that the defendants, notwithstanding their discharge, felt themselves in honor bound to pay the plaintiff's debt; and 2. The valuable consideration of one dollar, paid to the defendants by the plaintiffs when the new promise was made. (After discussing moral obligation as a consideration, the court proceeds.)

Ordinarily, courts do not go into the question of equality or inequality of considerations; but act upon the presumption that parties capable to contract are capable, as well, of regulating the terms of their contracts, granting relief only when the inequality

is shown to have arisen from mistake, misrepresentation, or fraud. A different rule would, in every case, impose upon the court the necessity of inquiring into and of determining the value of the property received by the party giving the promise. Such a course is obviously impracticable. In all cases, therefore, where the assumption or undertaking is founded upon the sale or exchange of merchandise or property, or upon other than a money consideration, and the promise has been deliberately made, the law looks no further than to see that the obligation rests upon a consideration; that is, one recognized as legal, and of some value. But the reason of the rule ceases, and hence the rule ceases, when applied to contracts to pay money, and founded solely upon a money consideration. How far a forbearance to sue, or the giving of time or the mere waiver of some right, may support a promise, we do not consider, since the question does not arise. Nor for the like reason do we consider how far the rule is qualified or limited by special statutes regulating interest; or in that class of contracts peculiar to the law merchant, as bottomry, *respondentia*, and the course of exchange. Aside from these and some other exceptions, at common law a contract for the exchange of unequal sums of money at the same time, or at different times, when the element of time is no equivalent, is not binding; and in such cases the courts may and do inquire into the equality of the contract; for its subject-matter, upon both sides, has not only a fixed value, but is itself the standard of all values; and so, for the difference of value, there is no consideration. In this principle the earliest prohibitions—earlier than the time of Alfred—and the later legislative enactments against usury, both in England and in this country, have their origin. The rule is deemed to be founded in good policy.

In the case before us the only legal consideration the defendants received was one dollar, for which they engaged to pay a much larger sum. This case falls therefore within the principle adverted to. The consideration was not only unequal, but grossly so. It was a mere nominal consideration; if even received by the defendants, it was, no doubt, regarded as such by them, and intended as such by the promisees. It was, at best, purely technical and colorable, and obviously is wanting in that degree of equitable equality sufficient to support the promise declared upon. The demurrer to the first count is therefore sustained.

Mere inadequacy of consideration alone is not sufficient to set aside a contract at law or in equity, but it is a cogent circumstance to be considered with other circumstances indicating fraud and imposition. *Davis v. Kean*, 142—496; *McLeod v. Bullard*, 84—515; *Potter v. Everett*, 42—152; *Trust Co. v. Forbes*, 120—355; *Monroe v. Fuchtlar*, 121—101; *Osborne v. Wilkes*, 108—651; *Barnett v. Spratt*, 39—171; *Williams v. Powell*, 36—460; *Berry v. Hall*, 105—154; *Gunter v. Thomas*, 36—199;

Grier v. Thompson, 21—493; Barnwell v. Threadgill, 56—50; Orrender v. Chaffin, 109—422; Fulenwider v. Roberts, 20—420; Leonard v. Power Co., 155—6; 6 R. C. L., 678.

Inadequacy alone is not sufficient to set aside a written instrument, unless it is so gross as to “shock the moral sense” and cause a reasonable person to say “he got the property for nothing.” Dorsett v. Mfg. Co., 131—254. But it is not necessary that the “moral sense should be shocked,” any other terms indicating gross disparity would be sufficient. Williams v. Johnston, 82—288.

As to inadequacy, see further 5 L. R. A., 856; 12 L. R. A., 463; 13 L. R. A., 581; 1 Page Cont., sec. 522; 1 Parsons Cont., 473 *et seq.*; Clark Cont., 112; Bispham Equity, 330; 6 Am. & Eng. Encyc., 694; Mordecai's Lectures, 700; Seymour v. Delaney, 3 Cowen, 445, 15 A. D., 270; Marks v. Gates, 154 Fed., 481, 14 L. R. A. (N. S.), 317.

Exchange of fixed values.—Where the law has fixed the value, as of money, a particular sum is not a consideration for an immediate obligation to pay a greater sum. Clark Cont., 111; 1 Parsons Cont., 474, and note; 1 Page Cont., sec. 323; Bishop Cont., sec. 410; Walford v. Powers, 85 Ind., 294; 44 Am. Rep., 16; Schnell v. Nell, 17 Ind., 29.

Celebrated cases.—A promise to give another a grain of rye on Monday and double the amount every Monday for a year. Thornborrow v. Whitacre, 2 Ld. Ray, 1164. A horse sold for one barleycorn for the first nail, and double for each nail in the shoe. James v. Morgan, 1 Lev., 111, 6 Am. & Eng. Encyc., 695, and note, 33 A. R. 182, note.

Sec. 4. Sufficiency of consideration.

1. Marriage.

(75) GURVIN v. CROMARTIE,

33 N. C., 174, 53 A. D., 406—1850.

This was an action of assumpsit upon the following facts:

A tract of land was devised to the plaintiff in fee simple, but with a limitation over to another person, in case the plaintiff should die without leaving lawful issue surviving him. In 1843 the plaintiff sold the land to defendant's testator for \$1,000, and conveyed it to him by a deed of bargain and sale in fee with general warranty. After the deed was executed the testator said to defendant, who had never married, “Now, Charles, be smart and get a wife and have a child, and I will give you \$500.” In December, 1844, the plaintiff married; and upon hearing of it, the testator said that he was bound to pay the \$500, if the plaintiff's wife should have a child. In February, 1846, the plaintiff's wife had a child, and the testator being then dead, the plaintiff gave notice to the defendant and requested payment; this being refused, the action was brought.

The defendant insisted that there was no consideration for the promise; that there was no assent to the contract by the plaintiff; that the plaintiff had not married and had issue within a reasonable time; and that there was no evidence that the plaintiff was the father of the child. There was a verdict and judgment for the plaintiff for \$500 and interest, and the defendant appealed.

RUFFIN, C. J. It is not needful to consider of the benefit, which the marriage of the plaintiff and the birth of issue might have been to the testator in preventing the estate, which he had purchased, from going over and making his fee absolute; since, without doubt, marriage is a valuable consideration, and sufficient to support a contract, whether executed or executory. It is generally the sole consideration on which marriage settlements are founded, and it sustains them against the creditors of the contracting parties and purchasers from them. It was so decided by Lord Clarendon in *Douglass v. Ward*, 1 Chan. Cas., 99; and in *Brown v. Jones*, 1 Atk., 188, Lord Hardwick said that a settlement on the wife before marriage, though without a portion, is good—for, marriage itself is a consideration. It is most clearly so; for, by the marriage, the respective parties incur duties and obligations to, or in respect of each other, and the one acquires in the estate of the other, or loses in his or her own, certain rights, which are valuable in a pecuniary sense. So, mutual promises between a man and woman to marry will sustain each other, and the party violating his or her promise is liable to the action of the other, as is often seen. In like manner a promise by one man to another to pay him so much, in consideration that he will marry a certain woman, is valid. The same reasons make it so, upon which a marriage settlement is upheld upon the consideration of the marriage. There are many cases of actions on collateral promises to one, in consideration that the promisee will marry a third person. In *Brown v. Garborough*, Cro. Eliz., 63, the promise was to a woman, that, if she would marry one R B, and one J B should not assure to them certain land, then the defendant would pay her £100, and the marriage took effect, and an action was brought thereon by the husband and wife. After verdict for the plaintiffs on *non assumpsit* it was moved in arrest of judgement, that there is no sufficient consideration, as the defendant was a stranger to the *feme*. But the court gave judgment on the verdict, giving as one reason that it was intended the woman was induced by the promisee to marry R B, which otherwise she would not have done, and peradventure she trusted the defendant rather than J B. *Bradford v. Foder*, Cro. Jac., 228, and *Berisford v. Woodroff*, *Ibid.*, 404, are other instances in which similar actions were sustained. It is true that in those cases it happened that the person whom the plaintiff was to marry, was a relation of the defendant, and that in *Browne v. Garborough*, some stress was laid on that circumstance. But it is quite clear that was not material; for, it is not the benefit that may accrue to the promisor or his relation which constitutes the consideration in such a case, but the liabilities incurred by the person marrying and the effects the

marriage may have on his or her estate, real or personal. Accordingly we find a precedent, 2 Went., 492, in which the declaration was on a promise to pay the plaintiff £7, in consideration that he would marry one D B, who then had a bastard; and there is another precedent, 2 Chit. Pl., 254, in which the declaration is on a promise to pay the plaintiff a sum named for marrying one E F, without otherwise describing her as of kin to the defendant, or as under any particular discredit or disadvantage. In *Ex parte Cottrell*, Cowp., 742, a person gave to another a bond to pay him certain sums by installments, in consideration that he would marry a woman, by whom the obligor had several bastard children, and after the marriage had, the obligor became bankrupt, and the question was, whether the obligee could prove this debt under the commission. A case was sent out of Chancery to the Court of King's Bench for the opinion of the court of law. The court interrupted the counsel for the creditor by inquiring what could be objected to the bond; and when the counsel on the other side contended that the debt could not be proved, because it was not founded on a good consideration, Lord Mansfield replied, that the consideration was good between the parties, as it was a stipulation between them in consideration of marriage; the one having performed his part and married the woman, the other was bound to perform his. Those cases and precedents fully establish that a promise to pay a man for marrying a particular woman will maintain an action, after the marriage had. It follows that a promise to pay him for marrying any woman, without designating one in particular, is likewise valid; for there is no perceptible distinction on which the law can give an action in the one case and not in the other. It was argued, indeed, that it might be a prejudice to one to marry a particular woman, and by possibility, in such a case, the man would not have married her, had it not been for the promise; whereas marriage generally is to be taken to be to the party's gratification and benefit, and, when he is left at large to his own free choice, his marriage can not be intended to be to his disadvantage; and therefore, that in this last case the marriage is not a sufficient consideration. But the distinction seems to be entirely untenable; for experience proves, even when the parties are of their own exclusive selection, marriage may or may not be judicious or happy. And it is just as much an act of prudence for a man to refrain from marrying any woman without having a competent livelihood for himself, his wife, and a family, as it is for him, under those circumstances, not to marry a particular woman. In either case he may be induced to marry or not to marry by his having or not having a reasonable consideration. But the law does not inquire whether the party has or has not made a fortunate match, because

it is not the adequacy of the consideration which determines the validity of the promise, but it is the doing of something by the party, to whom the promise is made, and it is a familiar elementary principle that such act, however trifling, constitutes a sufficient consideration. The act of marriage with any one woman must, in this point of view, be the same as that with any other; and, therefore, as far as the objection to the want of a consideration affects the case, the instructions to the jury were right.

It was next said that the plaintiff gave no such assent to this promise as amounted to a contract between the parties, on which the other party could have an action; and so, it was void for want of mutuality. That is but presenting the last objection in another aspect, and therefore can not avail. There are two modes of making simple contracts and declaring on them. The one is, when one party promises to do a certain thing, and in consideration of that promise the other party engages to do something on his part. Then, as nothing is done but the making of the promise, it is absolutely necessary that mutual valid promises, amounting to an express contract, should appear; otherwise, one of the parties might claim the benefit of the promise of the other, without in return doing any act or being liable for any loss whatever. And in such a case it is necessary only to set out the mutual promises, without averring performance on the part of the plaintiff. The other mode is, when one party promises, in consideration that the other will or will not do some act. Then no mutual promise need be set forth or exist; but it is necessary and sufficient to show the act done. It is not requisite, that it should appear, the plaintiff might have been sued for not doing the act; for he may recover after the thing done, though it was at his election whether he would do it or not up to the moment of its execution. . . . It was not necessary, therefore, that the declaration here should have averred more than it has, or that there should have been any engagement by the plaintiff to marry, in order to entitle the plaintiff to recover upon his marriage and the birth of a child.

As to the objection that these things were not done in a reasonable time, there is nothing in it. The contract specified no time within which the marriage and birth of issue should occur; and, from their nature, the party had his lifetime to perform them, and upon performance completed could claim the compensation agreed on—at least, unless, before any act done by the plaintiff towards performance, the other party had retracted his offer.

The last ground of exception was, that the plaintiff did not prove that he was the father of his wife's child; and to that was added here, that an inquiry on that point would be indecent, and therefore, also, that the promise ought not to entitle the plaintiff to

an action. The answer is, that there is legal evidence of the paternity of the child; as it is a matter of law that the husband, who cohabits with his wife—and nothing to the contrary was suggested here—is presumed to be in fact the father of the wife's issue. Then as to the notion of the indecency of investigating an inquiry into the legitimacy of the issue, it seems to the court to be entirely unfounded. This is not a case of a wager between two persons upon a question involving the feelings of others or naturally calculated unnecessarily to produce indecent inquiries. On the contrary, it is a promise to pay one a certain sum in consideration of marrying and having issue of the marriage; which is a very common contingency, upon which estates devised are enlarged or defeated, and it is also a contingency on which almost all the limitations in marriage settlements depend. They can offend the feelings or delicacy of no one, but are contingencies naturally connected with the proper provisions for a family, and therefore they almost always give rise to important limitations in settlements. The present is a transaction much of the same nature; whereby the plaintiff, who was single at the time, was to become entitled to demand a particular sum from the testator, upon his future marriage and the birth of issue.

Per Curiam.

Judgment affirmed.

A father makes a deed to his daughter and her intended husband as an inducement to the marriage; this is a valuable consideration. *Arnold v. Estis*, 92—162. An agreement by the father, in consideration of the marriage of his illegitimate daughter, to settle all his property on her and her husband, is upon sufficient consideration. *Wall v. Scales*, 16—476; see also *Kimbrough v. Davis*, 16—71.

1 Page Cont., sec. 299; Clark Cont., 114; 6 Am. & Eng. Encyc., 724; 9 Cyc., 320; 6 R. C. L., 653, 657; Contracts, Cent. Dig., sec. 239; *Winslow v. White*, 163—29; *McNutt v. McNutt*, 116 Ind., 545, 19 S. E., 115, 2 L. R. A., 372; *Prewett v. Wilson*, 103 U. S., 22; *Shadwell v. Shadwell*, 30 L. J. C. P., 145, 6 E. R. C., 9. A promise by a man to support a woman if she will release him from the promise of marriage, is upon a valuable consideration. *Henderson v. Spratlen*, 44 Col., 278, 98 Pac., 14, 19 L. R. A. (N. S.), 655.

2. Mutual promises.

(76) *HOWE v. O'MALLY*,

5 N. C., 287, 3 A. D., 693—1809.

In 1790 the plaintiff conveyed to the defendant by deed 145 acres of land, part of a tract containing 366 acres, purchased from Clement Hall. In 1792 the plaintiff conveyed to defendant another part of the same tract, purporting to contain 221 acres, "be the same more or less." Each tract was particularly described by metes and bounds, and together constituted the Clement Hall tract, and the defendant paid for the same. In 1806 the parties mu-

tually agreed to have the 221-acre tract surveyed, and if it contained more than 221 acres, the defendant should pay to the plaintiff the sum of \$10 per acre for the excess; and if there should be less than 221 acres the plaintiff should pay the same to the defendant for the deficiency. The survey was made, and the tract was found to contain 87 acres more than the deed called for. The defendant refused to pay, and this action was brought for \$870.

The defendant contended that the agreement was invalid unless it existed at the time the deed was made; and that evidence of it now contradicted the deed, for the plaintiff sold all the interest he had.

The plaintiff contended that the agreement need not subsist at the time the deed was made; that it was subsequent to the deed and independent of it, and that the mutual promises constituted a sufficient consideration.

BY THE COURT. Here are mutual promises; one is made the consideration of the other, and we are of opinion that the plaintiff's promise to refund in the event of a deficiency in the number of acres, is a good consideration to support the defendant's promise to pay, should there be more acres than called for by the deed.

Judgment for the plaintiff.

Note.—The facts in the above case have been stated briefly. See also *Sherrill v. Hagan*, 92—345.

(77) HOLT v. WELLONS,

163 N. C., 124, 79 S. E., 450—1913.

This was an action for breach of contract to sell and deliver cotton. The complaint alleges that Keen Co. contracted to sell to Austin-Stephenson Co. 200 bales of cotton, deliverable on September 20, and October 20, 1907; that this contract was assigned to plaintiff by Austin-Stephenson Co., and that Keen Co. failed to deliver the cotton. Keen Co. wrote the following letter to Austin-Stephenson Co. in March, 1907: "This is to confirm sale to you of 200 bales of good white cotton, f. o. b. Four Oaks, N. C., 100 bales to be delivered 20 September, 1907, and 100 bales to be delivered 20 October, 1907, at 10 cents per pound." The defendant is the receiver of the Keen Co.

The defendant demurred because the contract, as alleged in the complaint, is unilateral, without consideration, and void. The demurrer was overruled, and there was a verdict and judgment for the plaintiff, from which defendant appealed. Affirmed.

WALKER, J. . . . The demurrer was properly overruled. The contract, as alleged in the complaint, was not unilateral or without consideration or void. It was bilateral and bound both parties, the

defendant to deliver the cotton and the plaintiff to pay the price, and for this reason also it was based upon a sufficient consideration, the mutual promises of the parties being considerations for each other. 9 Cyc., 323. The promise to sell and deliver the cotton was founded upon the reciprocal promise to pay the price as its consideration. The contract is not void, but valid on its face.

It is argued that the plaintiff is bound by the form of the contract as contained in the letter copied into the complaint. If this be so, it does not help the defendant. The contract is still not unilateral, a *nudum pactum*, or otherwise void on its face, but, on the contrary, is apparently valid and binding. The letter merely confirmed the sale, implying that one had already been made, and its validity was then recognized. . . .

Two sisters owning a note in common agree that the survivor shall have the whole note; the mutual promises are sufficient consideration. *Taylor v. Smith*, 116—538.

A promise to take lumber for a vessel and a promise to furnish the lumber constitute a consideration for each other. *Whitehead v. Potter*, 26—257. Mutual promises to do several things specified in a contract on one side and on the other, constitute a valuable consideration. *Puffer v. Lucas*, 101—281. A employed B to work; B found out afterwards that the work was for C, but went on with the contract; the mutual promises would sustain the contract. *Forney v. Shipp*, 49—527. A agreed to hire certain slaves to B, and B agreed to pay for them and give a bond for payment and for their return; B called for the slaves and offered to give the bond, and A refused to furnish them; A was bound by the contract. *Abrams v. Suttles*, 44—99. An executory contract not performed in whole or in part, may be discharged by mutual agreement without any new consideration. *Brown v. Lumber Co.*, 117—287; *Bank v. Bridger*, 98—67. Mutual agreements in writing to have partition of land will be enforced. *Sumner v. Early*, 134—233. An agreement to submit a matter in controversy to the judge and abide by his decision, with a forfeiture of \$100 for failure to comply, is made on a valid consideration. *Pendleton v. Electric Light Co.*, 121—20. In order to make a contract binding, there must be mutual promises; or if unilateral, then some consideration moving from one party to the other. *Rankin v. Mitchem*, 141—p. 283. *Cotton Mills v. Mfg. Co.*, 125—329; *Kirkman v. Hodgin*, 151—588; *Buckingham v. Ludlum*, 40 N. J. Eq., 422; *Stovall v. McCutchen Co.*, 107 Ky., 577, 54 S. W., 969, 47 L. R. A., 287 (agreement between merchants to close stores at 6 o'clock).

See also 1 Page Cont., sec. 296; 1 Parsons Cont., 486; Clark Cont., 117; 6 Am. & Eng. Encyc., 727 and notes; 6 R. C. L., 676.

(78) AM. STEEL & WIRE CO. v. COPELAND,

159 N. C., 556, 75 S. E., 1002—1912.

This was an action by the plaintiff to recover \$610, the price of a carload of wire shipped to the defendant. The defendants admitted the purchase of the wire, but set up a counterclaim of \$650 as damages for breach of contract by the plaintiff. The defendants were supply merchants and were selling a certain kind of wire; the plaintiff's agent wished them to sell wire manufactured by the plaintiff; the defendant stated that he did not care to pur-

chase any wire from the plaintiff unless they could get all they wanted; that they could sell a carload a month, or at least five or six a year, and probably more. Thereupon the plaintiff's agent agreed that the plaintiff would furnish to the defendants all the wire that they wanted for their trade. In pursuance of this agreement, the defendants sent an order for one carload of wire, which was sent, and sold out in two or three weeks; another carload was ordered, and the plaintiff refused to send it, and upon defendant's refusal to pay for the first car, brought this action. There was evidence of loss of profits as damages, and the jury allowed the defendant \$300. The plaintiff appealed. Affirmed.

ALLEN, J. . . . The principal question debated between counsel . . . is, whether the agreement, as proven by the defendants, is wanting in mutuality or is so uncertain that it can not be enforced. We have said at this term, in *Elks v. Ins. Co.*, p. 619, that a contract must be definite and certain, or capable of being made so; and the plaintiff contends that under this rule an agreement on its part, if made, to furnish all the wire the defendants might want, would be too indefinite to create an enforceable contract.

The authorities are not in harmony on this question; some sustaining in whole or in part the contention of the plaintiff, as in *Bailey v. Austrian*, 19 Minn., 535; *Tarbox v. Gotzion*, 20 Minn., 139; *Drake v. Vorse*, 52 Iowa, 419; *R. R. v. Bagley*, 60 Kans., 425; *Harrison v. L. Co.*, 45 S. E. R., 731 (Ga.); while others hold to the contrary view.

A contract was sustained in *Furniture Co. v. Manufacturing Co.*, 110 Ill., 427, to supply all the pig iron which the party should need, use, or consume in his business; in *Cooper v. Wheel Co.*, 94 Mich., 272, to furnish such quantity of wheels as he may require during a certain season; in *Smith v. Moore*, 20 La. Ann. 220, to furnish all the ice they might require for two hotels for five years; in *L. Co. v. Coal Co.*, 160 Ill., 85, to furnish the coal company its requirements of coal for a certain season; in *Doiley v. Can Co.*, 128 Mich., 591, to furnish all the tin cans that plaintiff might use in his factory for a stated time; and in *Wells v. Alexander*, 130 N. Y., 642, to furnish the coal needed for steamers during one year.

These authorities would justify us in sustaining the agreement as a valid contract, binding between the parties, at the time the agreement was made: but it is not necessary to go so far, as it appears that after the shipment of one car, the defendants ordered another, which the plaintiff refused to deliver, and the evidence as to the amount of damages was directed to the loss of sales from this car, and His Honor restricted the recovery to the

profits that would have been made on sales to customers who applied for the wire and could not get it.

In any event, the agreement constituted a continuing offer to sell, on the part of the plaintiff, which when accepted, before the withdrawal of the offer, became effective as a contract, and the order for the second car was an acceptance of the offer *pro tanto*.

This was decided in *R. R. v. Witham*, 9 C. P., 19, and is approved in *Clark on Contracts*, 119-120; 1 Page Con., sec. 307; *Bish. Con.*, sec. 78. The case from the Court of Common Pleas is summarized in *Bishop, supra*, as follows: "In one case parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filled; then made another, which was declined; and on suit brought the defendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly it stood, in law, as a mere continuing offer by the defendant, but when the plaintiff made an order he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff." (The court then discusses the question of profits as damages.)

No error.

A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles as shall be needed, required, or consumed by the established business of the acceptor during a limited time, is binding and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time. *Wells v. Alexander*, 130 N. Y., 642, 29 N. E., 142, 15 L. R. A., 218; *Cold Blast, etc., Co. v. Kansas City Bolt Co.*, 114 Fed., 77, 57 L. R. A., 696; *McIntyre Lumber Co. v. Jackson Lumber Co.*, 165 Ala., 268, 51 So., 767, 138 A. S. R., 66; *Walker Mfg. Co. v. Swift & Co.*, 200 Fed., 529, 43 L. R. A. (N. S.), 730; *Pollock Cont.*, 196; 9 Cyc., 323; 6 R. C. L., 686.

In bilateral contracts the obligation may arise only on certain conditions, but there must be mutuality of obligation. A offers to furnish at a certain price such goods as B may order, and B offers to pay at such price for such goods as he may order, there is no contract, for B has not promised to order anything; but if B orders before A withdraws his offer, A is bound to sell at the price named. But if A offers to supply at a certain price all the goods of a certain kind that B may need in his business for a specified time, and B promises to buy such goods, the promises are binding, and A must furnish them and B buy them if he needs them. *Clark Cont.*, pp. 119, 120, citing *Cooper v. Wheel Co.*, 94 Mich., 272, and other cases; *Harriman on Cont.*, sec. 105, questions the reasoning in this case. The same question is presented in 1 Page on Cont., secs. 307, 308; 31 L. R. A., 529; 47 L. R. A., 427; 57 L. R. A., 696; 61 L. R. A., 402; 7 Am. & Eng. Encyc., 117.

3. Voluntary subscription.

(79) BAPTIST FEMALE UNIVERSITY v. BORDEN,

132 N. C., 476, 44 S. E., 47—1903.

The defendant's intestate made a subscription of \$1,000 to the Baptist Female University for the purpose of aiding in the payment of certain debts already created; the testator died before any part of this subscription was paid, and in his will he gave a legacy to this institution. The question was, whether this subscription could be enforced against his estate.

CONNOR, J. . . . The decision of this question is dependent upon the solution of the question whether there be any consideration to support the promise to give \$1,000 to the Baptist Female University. It is well settled by a long line of authorities that "a simple contract is incapable of becoming the subject of an action unless supported by a consideration." *Smith on Contracts*, 106. This is elementary and needs no citation. We find a very satisfactory definition of a valuable consideration in the case of *Curry v. Mislar*, 10 *Exc.*, 153: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." See *Clark on Contracts*, sec. 64.

We find from a careful examination of the numerous cases which have been decided by the courts of the Union, a division of opinion. Among the earliest is the case of *Stewart v. Trustees of Hamilton College*, 2 *Denio*, 403. Chancellor Walworth uses the following language: "As a subscription of a single individual agreeing to make a donation to another individual or a corporation for the benefit of the donee merely, I should find great difficulty in finding a valid consideration to sustain a promise to give without any equivalent therefor, and without any binding agreement on the part of the donee to do anything on his part which would be a loss or injury to him. . . . There is no difficulty in my mind in finding a good and sufficient consideration to support a subscription of this kind made by several individuals. Every member of society has an interest in supporting an institution of religion and learning in the community where he resides. And when he consents to become a subscriber with others to raise a fund for that purpose, the real consideration for his promise is the promise which others have already made or which he expects them to make to contribute to the same object. In other words, the mutual promises of the several subscribers to contribute toward the fund

to be raised for the specified object in which all feel an interest, are the real consideration of the promise of each. For this purpose also the various subscriptions to the same paper and for the same object, although in fact made at different times, may in legal contemplation be considered as having been made simultaneously. The consideration of the promise therefore is not any consideration of benefit received by each subscriber from the religious or literary corporation to which the amount of his subscription is made payable, nor is his promise founded upon any consideration of injury which the payee has sustained or is to sustain, or be put to for his benefit. But the consideration of the promise of each subscriber is the corresponding promise which is made by other subscribers. Mutual promises have always been held sufficient as between the parties to sustain the promise of each. And it has also been the settled law from the time of the decision in the case of *Dutton v. Pool*, *Freeman Law Report*, 471, in 1678, down to the present time, that a party for whose benefit a promise is made may sue in *assumpsit* upon such promise, although the consideration therefor was a consideration between the promisor and a third person."

In the case of the *Trustees of Dartmouth College v. Woodward*, 4 Wheat, 518, Chief Justice *Marshall*, speaking of the contributions to the funds of that institution, says: "These gifts were made, not indeed to make a profit to the donors or their posterity, but for something in their opinion of inestimable value, for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object in the mode prescribed by themselves."

In *Congregational Society v. Perry*, 6 N. H., 164, 25 Am. Dec., 455, it is held: "Where several agree to contribute to a common object, which they wish to accomplish, the promise of each is a good consideration for the promise of the others."

In *Norton v. Janvier*, 5 Harrington, 348, Booth, C. J., says: "The law will not enforce a mere gratuitous or voluntary promise made without consideration. But the question is what is a merely gratuitous promise. If a subscription be made to a common object on condition that such object is accomplished, or sufficient money be raised to effect that object, and that condition is performed, an obligation to pay would be perfect and may be enforced by a suit at law."

In *Wayne & Ont. Coll. Inst. v. Smith*, 36 Barb., 576, the court uses the following language: "I am by no means satisfied that, in this country where all our religious, educational and charitable institutions are founded by voluntary associations and dependent

upon private liberality, the personal benefit to be derived from the erection of a church edifice for worship by himself and family, or the erection of an academy or other institution of learning in his immediate neighborhood for the education of his children, are not works involving a sufficiency of private interest to every citizen and of pecuniary benefit to maintain a promise expressly and distinctly made, received and acted upon in the erection of buildings for such purposes." It is conceded by the court in this case that this view has not been adopted in most of the cases, and we quote it for the purpose of showing the line of thought passing through the judicial mind upon this question many years ago.

In *Williams College v. Danforth*, 12 Pick., 541, Chief Justice Shaw, in speaking of a subscription made by several to a common object, says: "In this case there is an express contract between parties capable of contracting upon mutual stipulations, each having an interest in the stipulations of the others, and these stipulations being such as might be enforced by judicial process. The subscription in the first instance was in the nature of a proposal to the college, by its terms not binding till accepted, and before acceptance revocable. But when the college accepted it they bound themselves to the performance of the conditions. The conditions were that they should apply the money, principal and interest, to the general literary, scientific and religious purposes of the institution, at Williamston, in which the defendant, with the other subscribers, declared they had an interest. . . . These were then mutual and independent promises, and, according to a well known rule of law, such promises are mutual considerations for each other." This action was brought upon subscription paper signed by the defendant with others. There were certain conditions upon which the money was to be paid.

In *Doyle v. Glasscock*, 24 Tex., 200, the court says: "The case thus disclosed, we understand to be this: The plaintiff was one of a committee to raise money for the purchase of a site for the lunatic asylum; he applied to the defendant and received his subscription, and on the faith of it (or the committee of which he was one), made the purchase, and he advanced the money, and now calls on the defendant in consideration of the premises to pay his subscription." The court held that the plaintiff could recover.

In *Maine Cent. Inst. v. Haskell*, 73 Me., 140, *Danforth, J.*, says: "But we are not prepared to admit that the subscription paper in this case 'is a bare naked promise' without any consideration whatever. It is true no consideration was actually received at the time of signing, but one is plainly implied, if not expressed, from the language used. The promise was of money for a specified purpose 'to make up the building fund for said institution.'

The promise was made to a different payee by name, one legally competent to take, incorporated for the express purpose of carrying out the object contemplated in the promise, and therefore amenable to law for negligence or abuse of the trust. It is not of course binding upon the promisor until accepted by the promisee, and may up to that time be considered as a revocable promise. But when accepted, and much more when the execution of the trust has been entered upon, where money has been expended in carrying out the object contemplated, it becomes a complete contract binding upon both parties, the promise to pay or at least an implied promise to execute, each being a consideration for the other."

In *Amherst Academy v. Cowles*, 6 Pick., 427, 17 Am. Dec., 387, the court, after reviewing the cases, says: "On this view of the cases which have occurred within this commonwealth analogous in any degree to the case before us, we do not find that it has ever been decided that when there are proper parties to the contract and the promisee is capable of carrying into effect the purpose for which the promise is made and in fact amenable to law for negligence or abuse of his trust, such a contract is void for want of consideration."

In *Ladies' Collegiate Inst. v. French*, 16 Gray, 196, *Chapman, J.*, says: "It is held that by accepting such a subscription, the promisee on his part agrees with the subscribers that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscribers, and these mutual and independent promises are made and constitute a legal and sufficient consideration for each other. They are held to rest upon a well-settled principle in respect to concurrent promises."

In *Johnson v. Wabash College*, 2 Ind., 555, on a promise to pay a subscription of fifty dollars, the court says: "The only objection made to the recovery on the note is that said note was given without consideration. The accomplishment of the object, in aid of which the money was promised, forms a good and valid consideration for the promise to pay it." . . .

In *Irwin v. Webster*, 56 Ohio St., 89, 36 L. R. A., 239, 60 Am. St. Rep., 727, the question involved in this appeal was presented for consideration. The court said: "That a promise which does not secure a benefit to him who makes it, or loss or detriment to him to whom it is made, or in any manner influence the conduct of others, is not enforceable, is a recognized general rule of law. . . . By the desire of Gilpin many other persons made donations in money and executed obligations to the University of like character to his, and his promise was an inducement to their donations and promises. . . . Whether the object of the promisors was to secure the opportunity of educating their own children

under such influences as they desired, or more generally to contribute to the general welfare by increasing the facilities for higher education, it has been accomplished by the expenditure of money and the incurring of obligations in reliance upon their promises and similar promises from others. Institutions of this character are incorporated by public authority for defined purposes. Money recovered by them on promises of this character can not be used for the personal and private ends of an individual, but must be used for the purposes defined. To this use the University is restricted not only by the law of its being, but as well by the obligation arising from its acceptance of the promise. A promise to give money to one to be used by him according to his inclination and for his personal ends, is prompted only by motive. But a promise to pay money to such an institution to be used for such designed and public purposes, rests upon consideration. The general course of decisions is favorable to the binding obligation of such promises. It is not contemplated by the parties, nor is it required by law, that in cases of this character the institution shall have done a particular thing in reliance upon a particular promise. Not only do the law and the parties contemplate the permanency of the institution, but all promisors understand that the proceeds of their promises will be mingled with prior and subsequent donations, and together constitute the financial support of the enterprise. The cases must be rare indeed in which such contributions or promises would be made if others had not been made before, and rarer still in which they would be made but for the belief that others will be made afterwards. The requirements of the law are satisfied, the objects of the parties secured and the perpetration of frauds prevented by the conclusion that consideration for the promise in question is the accomplishment, through the University, of the purposes for which it was incorporated, and in whose aid the promise was made." These observations appear to be peculiarly appropriate to the consideration of the question presented in this case. . . .

In the light of the foregoing authorities and the principles upon which they are based, we are of the opinion that the promise made by Judge Faircloth to pay to the trustees of the Baptist Female University one thousand dollars is supported by a sufficient consideration and constitutes a legal liability upon his estate. We think that this conclusion may be supported upon several views of the testimony.

The University is duly incorporated with the power to receive such subscriptions. It is under the control of the Baptist Church of which the testator was a member. Its trustees had appointed agents to solicit subscriptions. It had incurred liabilities for their

expenses and payment for their services. The subscription was made to the President of the University and an announcement thereof was made in a Baptist Convention. The subscription was thereby accepted, and by its acceptance the University assumed the responsibility, duty and obligation of applying the money to the purposes for which it was given. Other persons at said time and place made subscriptions for the same purpose. Announcements of each were made in the presence of Judge Faircloth. Most of these subscriptions were paid, and it must be understood, as a reasonable conclusion from the facts stated, that these subscriptions were made at the same time and place, and therefore operated as an inducement for other persons to make subscriptions for the same purpose which were received by the University and the duty or trust thereby imposed of expending the money for which it was given, assumed by the officers of the University. . . .

We think that in either of the several points of view and in accordance with the definition of a valuable consideration hereinbefore given, the promise was supported by such consideration.

DOUGLAS, J., dissenting in part: . . . Popular education is one of the noblest objects of a Christian age, but a gift should be the deliberate act of the donor. To construe into a contract a merely voluntary promise made upon the spur of the moment and perhaps under the influence of religious fervor, would in my opinion be subversive of the highest principles of jurisprudence as well as of public policy. In this case the promise was clearly within the ability of the testator, who was a man of clear and deliberate judgment, but in other cases it might not be, and its legal enforcement might be oppressive to the promisor and unjust to a dependent family.

My views are so clearly and strongly expressed by the Supreme Court of Massachusetts in an opinion delivered by Chief Justice Gray, afterwards on the Supreme Bench of the United States, in *Cottage St. Methodist Church v. Kendall*, 121 Mass., 528, 23 Am. Rep., 286, that I will close this opinion by the adoption of its language. Its numerous citations are omitted for the sake of brevity. There are numerous other decisions to the same effect, but this is sufficient to express my views. The court says: "The performance of gratuitous promises depends wholly upon the good will which prompted them, and will not be enforced by law. The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. To constitute such consideration, there must be either a benefit to the maker of the promise, or a loss, trouble or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made. A promise to pay money,

to promote the objects for which a corporation is established, falls within the general rule. In every case, in which this court has sustained an action upon a promise of this description, the promisee's acceptance of the defendant's promise was shown, either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money, or erecting a building, in accordance with the terms of the contract, and upon the faith of the defendant's promise. . . . Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward. . . . The suggestion in 5 Pickering, 508, substantially repeated in 6 Metc., 316, and in 9 Cushing, 539, that 'it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant, was in each case but *obiter dictum*, and appears to us to be inconsistent with elementary principles. Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for the defendant's promise to him. The facts in the present case show no benefit to the defendant and no vote or contract by the plaintiff, and, although it appears that the chapel was afterwards built by the plaintiff, it is expressly stated in the bill of exceptions that the learned Judge who presided at the trial did not pass upon the question of fact whether the plaintiff had, in reliance upon the promise sued on, done anything or incurred or assumed any liability or obligation. It does not, therefore, appear that there was any legal consideration upon which this action is brought."

CLARK, C. J., concurs in dissenting opinion.

See 1 Page Cont., sec. 298; Clark Cont., 118; 3 L. R. A., 468; 27 Am. & Eng. Encyc., 277, 279, and notes, where it seems the weight of authority is given against the validity of the promise.

4. Forbearance to exercise a right.

(80) LOWE v. WEATHERLEY,

20 N. C., 353—1839.

This was an action of *assumpsit*, in which the defense was a release under seal, and the facts were as follows:

The plaintiff sold to the defendant some slaves for \$850, and the defendant paid the price in bank-notes, and took a bill of sale under seal, containing the ordinary acquittance or release for the purchase money. At the time the release was given the defendant said: "The money is all good; if it is not, I will make it good." It turned out that a \$50 bill of the money was counterfeit. The plaintiff took affidavits as to the identity and the character of the bill, and sent them to the defendant, demanding good money. The defendant took the bill and the affidavits, and said he wanted to be satisfied that he let the plaintiff have the bill; and said to the agent, "Tell the old man not to be uneasy, but to wait until next Thursday week, and I will then come to his house and compromise or settle the matter, for I do not wish him to be injured." The plaintiff, in consequence of the message, forbore to take any proceedings to recover his demand, until the time had expired. The defendant failed to come and settle, and this action was brought. There was a verdict for the plaintiff, and defendant moved for a new trial: First, because the Judge erred in permitting any evidence to go to the jury tending to show a promise, after the date of the release; secondly, because there was no evidence to be left to the jury of any promise, or legal consideration to support a promise, subsequent to the release.

The court overruled the motion, gave judgment for the plaintiff, and the defendant appealed.

DANIEL, J. If the receipt which the plaintiff gave for the purchase-money of the slaves had been without seal, it might have been explained by parol; as a receipt is not conclusive evidence of payment. 2 Term Rep., 366, 5 B. & Ald., 611, 3 B. & C., 421, 3 B. & Adol., 313. In that case the plaintiff might have recovered upon the original consideration, as a balance of the price of the slaves; the counterfeit bill being a nullity, could not be considered a payment, although both of the parties were ignorant at the time that the bill was counterfeit. Hargrave v. Dusenberry, 9 N. C., 326; Markle v. Halfield, 2 John. Rep., 445. But as the plaintiff affixed his seal to the acquittance, that circumstance gave it the effect of a release, which the defendant has pleaded in bar of all demands arising upon the original transaction, and it estops the

plaintiff to contradict or explain it by parol evidence. *Brocket v. Foscue*, 8 N. C., 64; *Gilbert's Law of Evidence*, 142; *Rountree v. Jacobs*, 3 Taunt., 154; *Sampson v. Cork*, 5 B. & A., 506. But the plaintiff has relied on a promise made by the defendant subsequent to the date of the release. The defendant contends, however, that if such a promise was made, it was without consideration, and that no action lay upon it, and that therefore the court erred in submitting it to the jury. The plaintiff says that as the bill was bad, he had a remedy either at law upon the promise made by the defendant to make the bill good, *Baker v. Deavey*, 8 Eng. Com. Law Rep., 193, or he had a remedy in equity to set aside the release, as having been given under a mistake so far as relates to this demand; and that he had, at the special instance and request of the defendant, forbore to take judicial proceedings to obtain his rights until the time expired, and that that forbearance is a good consideration. It seems to us that such a consideration is sufficient to uphold a promise; and that the plaintiff, notwithstanding the release, had a remedy in some court. An action will lie upon a promise to pay a sum of money in consideration of giving time, or forbearing to sue for a precedent debt, or other cause of action. Com. Dig., B., 1 (action of *assumpsit*), 2 Com. on Cont., 420.

Secondly, the defendant contends that if the consideration of forbearance be, in this case, deemed sufficient in law to uphold a promise, still there was no evidence of any promise made by him, to have been left by the Judge to the jury; and that the Judge should have nonsuited the plaintiff. The answer given by the defendant to the plaintiff's agent, when he demanded payment, was, in our opinion, such evidence as the Judge was bound to leave to the jury for them to determine whether a promise had or had not been made. Strike out the word "compromise" in the agent's testimony, and the balance of his evidence is very strong to show that the defendant did promise to pay the money. That word remaining, leaves it doubtful, and the jury were the proper persons to determine the fact.

To prevent misapprehension, we desire to be understood as expressing no opinion whether the plaintiff might not have recovered independently of the special contract for forbearance, upon the promise to be inferred from the transaction, and actually made when the release was executed, to make the notes good, should they turn out to be counterfeit, and we are clearly of the opinion, that of an action founded on such a promise, a Justice had jurisdiction. It is a promise to pay money, if what has been received as a bank-note be not what it purports, and not a guaranty of the

solvency or punctuality of the makers of the note. The judgment is affirmed.

Per Curiam.

Judgment affirmed.

(81) HAMER v. SIDWAY,

124 N. Y., 538, 27 N. E., 256, 21 A. S. R., 693, 12 L. R. A., 463—1891.

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is, whether by virtue of a contract, defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the twentieth day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would, at that time, pay him, the said William E. Story, 2d, the sum of five thousand dollars for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of the agreement."

The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that, unless the promisor was benefited, the contract was without consideration; a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him." Anson on Contracts, 63.

"In general, a waiver of any legal right at the request of an-

other party is a sufficient consideration for a promise." Parsons on Contracts, 444.

"Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent's Com., 12th ed., 465.

Pollock, in his work on contracts, page 166, after citing the definition given by the exchequer chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means, not so much that one party is profiting, as that the other abandons some legal right in the present or limits his legal freedom of action in the future, as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years, upon the strength of the promise of the testator that for such forbearance he would give him five thousand dollars. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement; and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken. . . .

"If a person be possessed of a right which he may legally exercise, his forbearance at the instance of the promisor to exercise it, is a valuable consideration for the promise." 6 Am. & Eng. Encyc., 744, and notes citing numerous instances; Clark Cont., 121; 1 Page Cont., sec. 301; Talbott v. Stemmons, 89 Ky., 222, 12 S. W., 297, 5 L. R. A., 856; Wolford v. Powers, 85 Ind., 294, 44 A. R., 16; Prater v. Miller, 25 Ala., 320, 60 A. D., 521; Queal v. Peterson, 138 Iowa, 514, 116 N. W., 593, 19 L. R. A. (N. S.), 842; Shadwell v. Shadwell, 6 E. R. C., 9; right to name a child, Gardner v. Denison, 217 Mass., 492, 105 N. E., 359, 51 L. R. A. (N. S.), 1108; Freeman v. Morris, 131 Wis., 216, 109 N. W., 983, 11 Ann. Cas., 481; 9 Cyc., 335; 6 R. C. L., 656.

A change in the payment of interest so as to make it semi-annual is a sufficient consideration. Scott v. Fisher, 110—311; receiving interest in advance is *prima facie* evidence of a contract to forbear. Hollingsworth v. Tomlinson, 108—245. Extension of time for the payment of a debt is a valuable consideration. Chemical Co. v. McNair, 139—326; but such agreement to extend time must be under seal or have a sufficient consideration. Bank v. Lineberger, 83—454; Supply Co. v. Finch, 154—456; Ann. Cas., 1912 A, 412; 52 L. R. A. (N. S.), 328.

Plaintiff had charge of wrecked goods and was about to sell them, when the owner agreed to pay him his expenses if he would not sell; upon this promise the owner obtained possession of the goods, and was held liable to the plaintiff on his promise. Etheridge v. Thompson, 29—127.

A promise not to resort to bastardy proceedings is a sufficient consideration for the promise of the defendant to pay for support, etc. *Burton v. Belvin*, 142—151.

5. Compromise of doubtful claims.

(82) MAYO v. GARDNER,

49 N. C., 359—1857.

This was an action of *assumpsit*, in which the declaration was, 1, upon an oral warranty of the merchantable quality of certain turpentine; and 2, upon failure to perform an award.

In August, 1854, the plaintiff bought of defendant 74 barrels of turpentine for \$248; the turpentine was there present, and it was agreed that the plaintiff should take it as it was, without inspection; the price was all paid by April, 1855. Between the date of the purchase and the final payment of the price, the turpentine remained where it was, but the barrels being inferior, much of it ran out upon the ground, and was scraped up by plaintiff's direction and restored to the barrels. After payment had been made, the parties agreed to have the turpentine inspected, and that the plaintiff should not pay for that which was worthless. The inspector reported 27 barrels worthless, the defendant refused to repay the money, and the plaintiff sued for the value of the 27 barrels or the proportionate part of the whole amount paid.

The court intimated that the plaintiff could not recover, and the plaintiff submitted to a nonsuit and appealed.

NASH, C. J. There is error. The court below was of opinion that the plaintiff could not recover, upon the ground, we suppose, (for no reason is assigned), that there was no consideration for the new implied promise on the part of the defendant. The original contract was at an end, but in consequence of the insufficiency of the barrels, a considerable quantity of the turpentine ran out, which by the direction of the plaintiff was scraped up and restored to the barrels. It was then agreed between the parties, that a Mr. Grimmer should inspect the turpentine, and what he condemned for dirt plaintiff should pay nothing for. It was accordingly inspected in the presence of the parties, and it was adjudged by Grimmer that 27 barrels were not worth anything. This is the substance of what was stated. We are not passing upon the original contract, but our attention is directed solely to the question as to the existence of a new consideration for the new promise.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a submission of claims and demands to arbitration is binding, so far as this, that the mutual promises are a consideration, each for the

other. 1 Parsons Cont., 364; Com. Dig. "Action on the case on *Assumpsit*." A1, B2. In *Keson v. Barclay*, 2 Penn. Rep., 531, an action of slander for words was compromised by the defendant's agreeing to pay the plaintiff a sum certain; the court held there was a sufficient consideration, though the words used were not slanderous. In *re Lucy*, 21 Eng. L. & Eq. Rep., 199, it was decided that, to sustain a compromise, it was sufficient, if the parties thought, at the time of entering into it, that there was a *bona fide* question between them, though, in fact, there was no such question.

Now, in this case, Mr. Grimmer, the referee, stated that, at the time he inspected the turpentine, none of it was good. The plaintiff, no doubt, thought he was entitled to compensation from the defendant to the value of the whole 27 barrels, or a proportionate part of the sum paid by him for the whole. The defendant, on his part, thought he had a good defense to the whole claim. In this situation they agree, in order to avoid a lawsuit, that Mr. Grimmer shall inspect the turpentine, and what he condemned for dirt, the plaintiff should pay nothing for. But the plaintiff had already paid the whole price to the defendant. The meaning of the parties, therefore, must have been, that the defendant would pay to the plaintiff the value of the turpentine condemned by Grimmer. After this agreement, the plaintiff could not have maintained an action on the warranty, or of deceit.

Per Curiam.

Judgment reversed.

If an agreement is entered into upon a supposition of a doubtful right, it is binding in the absence of fraud. *Truett v. Chaplin*, 11—178. It is not necessary that there should be a legal cause of action; it is sufficient if there is a *bona fide* difference of opinion as to the rights of the parties. *Findlay v. Ray*, 50—125; *Parrish v. Strickland*, 52—504. There was a contest about a will, and the parties entered into an agreement to adjust their rights; this will be sustained as a compromise of doubtful rights or as a family settlement. *Bailey v. Wilson*, 21—182. A release of a controverted claim is a valuable consideration. *Lipschutz v. Weatherley*, 140—365; *York v. Westall*, 143—276; *Barnawell v. Threadgill*, 56—58; *Williams v. Alexander*, 39—209; *Burriss v. Starr*, 165—657; *Peyton v. Shoe Co.*, 167—280.

Some cases hold that there must be reasonable ground for belief in the validity of the claim; and others hold that forbearance to prosecute an invalid claim, though honestly believed in, is no consideration. *Clark Cont.*, 125; 6 Am. & Eng. Encyc., 711—714, and notes; 1 Page Cont., sec. 321. A forbearance to do what one can not legally do, or to enforce an entirely groundless claim, would not be a sufficient consideration. *Ibid.*; *Smith v. Farra*, 21 Ore., 395, 28 Pac., 241, 20 L. R. A., 115; *Morgan v. Hodges*, 89 Mich., 404, 50 N. W., 876, 15 L. R. A., 438; *Armijo v. Henry*, 89 Pac., 305, 25 L. R. A. (N. S.), 275, and subject note; *Kiler v. Wohletz*, 79 Kan., 716, 101 Pac., 474, L. R. A., 1915 B, 11; *Stapilton v. Stapilton*, 1 Atk., 2, 12 E. C. R., 100, 3 H. & W. L. C. Eq., 684, with discussion of the doctrine especially with reference to family settlements; 9 Cyc., 345; 6 R. C. L., 662; *Contracts*, Cent. Dig., sec. 328; *Dec. Dig.*, sec. 68.

6. A promise to do what one is already bound to do.

1. BY PRIOR CONTRACT.

(83) FESTERMAN v. PARKER,

32 N. C., 474—1849.

This was an action of *assumpsit*, in which the plaintiff declared specially, and for work and labor done, materials furnished, goods, etc., sold and delivered, and for money paid to the use of the defendant.

In the spring of 1844, the plaintiff agreed to build and put into operation a sawmill for the defendant, for which the defendant was to pay him \$100, board him and his hands, and furnish timber. The defendant advanced \$20 of the amount to enable the plaintiff to get certain materials. The plaintiff afterwards sent word to the defendant that he could not do the work because the price was too low. The defendant replied: "Tell him to come on and do the work, and I will do what is right or pay what is right." The plaintiff completed the work, and claimed that it was worth \$150. The defendant contended that the work was improperly done and that he had incurred expense in putting it in proper condition, and that he had paid the \$100 promised.

The court charged that on the special contract the plaintiff could not recover, if the defendant had paid the \$100, supposing the work to have been well done.

Upon the second count, on a promise to pay for the materials furnished and work done, implied from the defendant's having made use of the materials and work, the court charged, that when work is not done according to contract, although the party can not recover on the contract, still he may recover for the materials and work, but not more than the original price, and if that had been paid, he could recover nothing more.

Upon the other view presented by the plaintiff's counsel, the court charged that if the original contract had been rescinded by mutual consent, so that neither was in any way bound, and the defendant had promised to do what was right or pay what was right, the plaintiff could recover the value of the materials and work, which he alleged was \$150. But the court was of opinion that the evidence did not show such rescission, and without this, the defendant's promise to pay more would be without consideration. There was a verdict and judgment for defendant, and the plaintiff appealed.

NASH, J. In the argument of the case here, the first exception taken by the plaintiff's counsel to the Judge's charge is, that it

ought to have been submitted to the jury to decide, whether or not the first contract was rescinded by the parties. His Honor instructed the jury there was no evidence, that the original contract had been rescinded and another substituted. There can be no doubt but that the construction of a contract is a matter of law. If committed to writing, the meaning of the terms, where they are explicit, is a question for the court; but if doubtful and uncertain, they may be submitted to the jury, with proper instructions given hypothetically, as the case might be, and in doing so, no error is committed, as has been declared by the court this term. And if verbal, and the parties dispute about the terms of the agreement, it involves a question of fact as to the terms to be decided by the jury; but if there is no dispute as to the terms, and they be precise and explicit, it is for the court to declare their effect. *Massey v. Belisle*, 24 N. C., 176. Here there is no dispute as to the terms, but only as to their effect. In considering the question, as one of law and not of fact, the Judge below committed no error. This brings up the main question, so far as this case is concerned, viz., was the construction put upon the terms, used by the plaintiff and defendant, correct in point of law? The plaintiff had agreed to build a mill for the defendant, for the sum of \$100, and had received in part payment the sum of \$20. Becoming dissatisfied with his contract, he sent the defendant word that he could not do the work for that sum, to which the defendant replied, "Tell him to come and *do* the work, I will *do* what is right or *pay* what is right." One party to a contract can not rescind it; to do so there must be the action of both parties, showing an assent to it, for it is as much a contract to rescind one as to make one. If in this case the plaintiff had sent back the money, which had been paid to him, and the defendant had received it, or if the defendant had brought an action for it, the original contract would have been rescinded. There is nothing in the case to show that either the plaintiff or defendant had intended to set aside the first contract. The plaintiff found, upon reflection, that he had made a bad bargain and was desirous to improve it; the defendant had made *his* calculations, and was willing to give the sum agreed on to have his mill built. Perhaps it was as much as the work was worth or as much as he was able to give. At any rate such was the contract between the parties; the plaintiff was to build the mill and defendant pay therefor \$100. The first contract was not rescinded.

His Honor, having instructed the jury that the contract was not rescinded, proceeded to charge them, as to the effect of the promise made by the defendant, if any was made, by using the words, "do or pay what is right." If, by this, he was to be understood as making an additional promise to pay more than the price agreed

on, it was not binding, "for want of a consideration." On the part of the plaintiff it is insisted that, although the first contract was not rescinded, yet the parties were at liberty to vary it. There is no doubt of this proposition; but it will be recollected that the variation of a contract is as much a matter of contract as the original agreement—it equally requires the concurrence of intention in the parties; it can not be varied at the mere will and pleasure of either. But in what was the contract in this case varied? not in the work to be done; that was not altered in the slightest manner; the plaintiff came under no new obligation; he was to do the same work he had previously bound himself to do. It was varied, says the plaintiff, in this, that the defendant promised to give an additional fifty dollars, if he would build the mill. Let it be admitted that the defendant, under the circumstances, had, in so many words, promised the plaintiff that he would give him \$50 more, or \$150 for building the mill, would that have been in law a valid promise? I concur in the opinion that it would not. A consideration is an essential ingredient to the legal existence of every simple contract. This consideration consists, as defined by Mr. Smith, in his treatise on contracts, p. 87, to be "any benefit to the person making the promise, or any loss, trouble or inconvenience to, or charge upon the person to whom it is made." The case states that the \$100, originally promised, had been paid by the defendant, and the controversy is for the \$50 under the alleged promise. What loss, trouble or inconvenience, or charge resulted to the plaintiff by his executing the work? He was bound to build the mill by his original contract, and he was to do and did nothing more. What benefit was to result to the defendant by the promise to pay the additional \$50? None whatever; he was to get from the plaintiff precisely the same quantum of work without it as with it. The promise, therefore, if made, was purely a "*nudum pactum*," not binding in law, however it may be so in honor and conscience. The enforcement of contracts of the latter character, in the language of Lord *Denman*, in *Eastwood v. Kenyon*, 11 Ad. & El., 438, however plausibly recommended by "the desire to effect all conscientious engagements, might be attended with mischievous consequences to society." The truth of this opinion might be illustrated by a variety of cases. One is furnished by that of *Harris v. Watson, Peake*, 72. There it was laid down by Lord *Kenyon*, that a promise made by a captain of a ship, to one of his seamen, when the vessel was in extraordinary danger, to pay him an extra sum of money, as an inducement to extra exertion for her safety, was a void promise, because every seaman is bound to exert himself to the utmost for the safety of the ship, and therefore the captain would get nothing from the seaman in exchange for his

promise, except that which the seaman was bound to do before. The principle established or recognized in the case last cited governs this; the plaintiff was bound to do the work and the defendant would get nothing from the new promise but what he was entitled to before he made it. If the words used by the defendant amounted to a promise, it is *nudum pactum*, as founded on no legal consideration, and his motive in using them is very obvious; it was to induce the plaintiff to do that which, by his contract, he was already bound to do. In the argument, the counsel referred the court to two cases. One was 52 E. C. L. R., 361, *Pontifex v. Wilson*, and the other from 19 John., 205, *Wood v. Edwards*. We do not think either assists the plaintiff's case. In the first, the plaintiff had contracted to erect certain buildings for the defendant, who was to pay a stipulated price, when they were delivered. When the buildings had progressed some time, the plaintiff refused to go on with the work, unless defendant would give him security for the payment of the money. "The whole dispute," says Chief Justice *Tindal*, "as shown by the correspondence, was, whether the defendant would give security, which the plaintiff insisted on, and *had no right to insist on.*" The case in *Johnson* was, that the parties had entered into a contract under seal, for the purchase and delivery of a certain quantity of coal, at a price agreed. After its execution, a new agreement was drawn up by the plaintiff, but unexecuted by him, and sent to the defendant for his approval. The defendant, by letter, expressed his willingness to alter the old agreement, and promised to execute the new one at some future time, but never did. The action was in *assumpsit* on the new agreement. The court decided that the first agreement was not set aside, but was in force, and that the proposition of the defendant to execute the new one was not binding on him; as well on the ground of *want of consideration* as of mutuality. These cases sustain the view taken by the Judge below, both as to the rescinding of the original contract, and the invalidity of the second, if made.

No exception is taken to His Honor's charge upon the first count in the declaration, nor to the second, as to the rule laid down by him as to the measure of damages.

Per Curiam.

Judgment affirmed.

Where the parties have rescinded the former agreement, they may make a new contract; or if the prior contract is changed in any respect, that will be a sufficient consideration. Some courts hold that a promise, as in the principal case, would be binding, because it is an advantage to the promisor to have the work done. *Clark* Cont., 127, 128; 1 *Page* Cont., sec. 312; *Abbott v. Doane*, 163 Mass., 433, 40 N. E., 197, 47 A. S. R., 465, 34 L. R. A., 33, and notes. In the above case, and in *Shadwell v. Shadwell*, 9 C. B. (N. S.), 159, 6 E. R. C., 9, it was held that a promise to a third person to perform an existing contract was valid, but that

is not in accord with the general rule. *Harriman Cont.*, secs. 122-125; 6 *Am. & Eng. Encyc.*, 752; *King v. Duluth, M. & N. R. R.*, 61 *Minn.*, 482, 63 *N. W.*, 1105; *Shriner v. Craft*, 166 *Ala.*, 146, 51 *So.*, 884, 28 *L. R. A. (N. S.)*, 450, 139 *A. S. R.*, 19; *Linz v. Schuck*, 106 *Md.*, 220, 67 *Atl.*, 286, 11 *L. R. A. (N. S.)*, 789, 124 *A. S. R.*, 481, 14 *Ann. Cas.*, 495; *Morecraft v. Allen*, 78 *N. J. L.*, 729, 75 *Atl.*, 920, 54 *L. R. A. (N. S.)*, 1; 9 *Cyc.*, 347; *Pollock Cont.*, 203; 6 *R. C. L.*, 664, 666. A pre-existing debt is a sufficient consideration to sustain a chattel mortgage. *Brown v. Mitchell (N. C.)*, 84 *S. E.*, 404.

2. BY LAW.

(84) SWEANY v. HUNTER,

5 *N. C.*, 181—1808.

The plaintiff was summoned as a witness for the defendant, and failing to attend, he was called out and judgment *nisi* for the forfeiture was entered against him. Afterwards there was an agreement between them, that if the plaintiff would attend at the next term of court and give his testimony, the defendant would save him harmless as to the said forfeiture. The plaintiff did attend and testify, and afterwards the defendant sued out a *sci. fa.* against him, the conditional judgment was made absolute, and the forfeiture was collected by execution. The plaintiff brought this action to recover damages for breach of the agreement, and it was submitted to the court to determine whether there was a sufficient consideration to support the promise of the defendant to save the plaintiff harmless as to the forfeiture.

LOCKE, J. To ascertain whether there is a sufficient consideration in this case to support an *assumpsit*, it is first necessary to examine whether the plaintiff was not bound to attend the court by operation of the subpoena, and without any additional recompense or reward. The Act of 1777, ch. 2, declares "that every witness being summoned to appear in any of the said courts in manner as hereinbefore described, shall appear accordingly and continue to attend from term to term until discharged by the court, or the party at whose instance such witness shall be summoned; and in default thereof, shall forfeit and pay to the person at whose instance the subpoena issued the sum of fifty pounds, and shall be further liable to the action of such party for the full damages which may be sustained for want of such witness's testimony; who shall recover the same by *scire facias* with costs." From this section the court infers that to enforce the attendance of a witness at each and every term during the continuance of the suit, it is only necessary that he should be subpoenaed once; and if he fail and is called out, the forfeiture of fifty pounds does not release the witness from an obligation to attend at the subsequent term. And this inference the court draws from two considerations: First, because

the law declares that he shall continue to attend from term to term until discharged by the court or the party at whose instance he was summoned; and is altogether silent as to the forfeiture operating to release him; it states expressly how long he shall attend under the subpoena and how he is to be released—and second, because the damages which the act gives the remedy to recover against the witness could never be obtained or enforced, if upon the first default made by the witness, calling him out upon his subpoena, was to release him from further attendance. Nor until he was examined upon the trial of the cause, few instances would occur in which the plaintiff would be enabled to ascertain what the witness would have proved had he attended; and what proportion of damages he sustained on account of his nonattendance; and if he is to be discharged upon the first forfeiture, the plaintiff would be deprived of this additional remedy. But if the construction given by the court to the act of assembly be correct, the remedy is easy and the proof plain. Suppose a witness to be so material, that on his testimony alone, a particular point in the cause can be supported, and he fails to attend pursuant to the subpoena served on him; he is called out, the plaintiff compelled to suffer a nonsuit by reason of his nonattendance, or to continue the cause, or being nonsuited, prays to have the nonsuit set aside and the cause reinstated, which is granted to him upon payment of all costs up to that time; at the next term the witness attends, the cause is tried, and the plaintiff recovers—surely the plaintiff would be entitled to recover these costs by way of damages sustained by him from the absence of the witness. But it is said that this part of the act can still be enforced by taking out a second subpoena—this would expose the plaintiff to more trouble and expense than the law intended to impose upon him; and if the Legislature had intended to expose him to this trouble and expense, they would have expressed such intention; but they have expressly said the contrary by compelling the witness to attend until discharged under one subpoena. Suppose the mode of suing out other subpoenas upon the default of witnesses was adopted, and in a case where there might be twenty witnesses; each witness fails to attend for two or three terms and is called out at each court, and new subpoenas are issued, the plaintiff finally recovers; would it be just and fair to make the defendants pay for all these subpoenas, or would it be any object to the plaintiff to bring an action on the case against each witness to recover the costs of a single subpoena? If not, then this additional expense is to be incurred by the plaintiff who has obtained his judgment and who, the law intends, should recover all his costs. The court is therefore of the opinion that this witness was under an obligation to attend the courts without any additional re-

ward, and by virtue of his subpoena; and if so, the promise on which this suit is brought is without consideration, and must be regarded as *nudum pactum*. It is a rule well settled that an *assumpsit* will not lie to recover money promised for doing that which it was the party's duty to do without reward. 2 Bur., 924; *Statesbury v. Smith*. Judgment must be entered for the defendant.

For the same statute in regard to the attendance of witnesses, see Revisal, 1643. A promise to pay a sheriff or other officer more than his lawful fees is invalid, unless it be for something more than he is required to do as such officer. Clark Cont., 127; 1 Page Cont., sec. 311; 6 Am. & Eng. Encyc., 751, 752; *Studley v. Ballard*, 169 Mass., 295, 61 A. S. R., 286; 9 Cyc., 347; 6 R. C. L., 664.

3. PART PAYMENT AS SATISFACTION.

(85) KOONCE, Admr., v. RUSSELL, Admr.,
103 N. C., 179, 9 S. E., 316—1889.

This was a motion in a special proceeding by creditors against the representatives of the estate of Daniel L. Russell, deceased. The plaintiff's intestate had recovered two judgments against the executors of Daniel L. Russell—one for \$811.82, in 1871, and the other for \$852.74, in 1873. The plaintiff's intestate filed said judgments in the creditors' bill, in 1879, which is still pending. In 1885, the executor of Daniel L. Russell offered the sum of \$1,000 by way of compromise for the two judgments, which amounted to \$1,492.29, and also to pay all the costs. The plaintiff accepted the offer, and gave the said executor a receipt in full for the whole amount of the judgments. The costs have not been paid. The motion was for a judgment in favor of the plaintiff for the balance due the estate of his intestate on the said judgments, after deducting the \$1,000 paid as a compromise.

The motion was overruled, and the plaintiff appealed.

AVERY, J. The plaintiff's counsel presented and relied on the single point, for which he had contended in the court below, that the plaintiff was entitled to recover the sum of \$492.27, being the difference between the aggregate amount due on the two judgments and the amount actually paid by the administratrix, Olivia Russell, through her agent, in compromise for the whole.

If the compromise had been made prior to the passage of the Act of 1874-75 (Laws of 1874-75, ch. 178, sec. 1, The Code, sec. 574), the payment of one thousand dollars would not have discharged the debt, but would have been valid only *pro tanto*, leaving to the plaintiff the right to collect the difference between the sum paid and that actually due, as he seeks to do in this action, because the agreement to receive a part for the whole was held to be a *nudum pactum* as to all in excess of the sum actually paid.

Currie v. Kennedy, 78 N. C., 91; Mitchell v. Sawyer, 71 N. C., 70; Hayes v. Davidson, 70 N. C., 573; Love v. Johnston, 72 N. C., 415.

The contract to accept one thousand dollars as a payment in full of both judgments, was made, however, in October, 1885, and when the statute (The Code, sec. 574), was and had been for many years the law of the land. But the plaintiff's counsel contends that the last-named act could not be construed to apply to a debt, upon which the plaintiff's intestate recovered judgment before it was enacted, because it would be a violation of sec. 10, art. 1, of the Constitution of the United States, to give to the law a retroactive effect, and he relies upon the case of *Edwards v. Kearzey*, 96 U. S., 595, to sustain the position. The parties contracted as to payment with reference to the law in force, when the contract was made, and, if such a receipt had been deemed a *nudum pactum*, under the law then existing, as to any part of the debt, a subsequent act could not have supplied the want of consideration. But the compromise must be considered, just as though the statute (The Code, sec. 574), had been incorporated into the receipt given by the plaintiff.

"The obligation of a contract consists in its binding force on the party who makes it. This depends upon the law in existence when it is made. These are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other." Cooley's Cons. Lim., p. 285.

A law providing that if creditors, in the exercise of their own judgment, voluntarily accept a part of a debt already in existence in discharge of the whole, can not be held to impair the obligation of the original contract. *Grant v. Hughes*, 96 N. C., 177; *Fickey v. Merrimon*, 79 N. C., 585.

No error.

Affirmed.

For the law before 1874, see *McKenzie v. Culbreth*, 66—535; *Bryan v. Foy*, 69—45 (an agreement under seal for this purpose could be inquired into); *Mitchell v. Sawyer*, 71—70; *Bank v. Commissioners*, 116—362. For the present law, see *Clark's Code*, sec. 574; *Revisal*, sec. 859; *Tiddy v. Harris*, 101—589; *Jones v. Mizell*, 104—9; *Kerr v. Sanders*, 122—635; *Wittkowsky v. Baruch*, 127—313; *Boykin v. Buie*, 109—501; *Petit v. Woodlief*, 115—120; *Ramsey v. Browder*, 136—251. The last three cases were executory agreements to accept a smaller amount as a discharge.

In the absence of statute, part payment is not generally considered a satisfaction, unless it can be brought under the doctrine of accord and satisfaction or the compromise of doubtful claims. *Fuller v. Kemp*, 138 N. Y., 231, 33 N. E., 1034, 20 L. R. A., 785; *Melroy v. Kemmerer*, 218 Pa., 381, 67 Atl., 699, 11 L. R. A. (N. S.), 1018; *Cumber v. Wane*, 1 Strange, 426, 1 Smith L. C., 439; *Pinnell's case*, 5 Co. Rep., 117a; *Foakes v. Beer*, 54 L. J. Q. B., 130; 1 E. R. C., 368; 9 Cyc., 354; 6 R. C. L., 665; *Pollock Cont.*, 210; *Clark Cont.*, 129; *Page Cont.*, sec. 313; 6 A. & E. Enc., 754.

7. A promise to do an impossible thing.(86) LEROY v. JACOBOSKY *et al.*,

136 N. C., 443, 459, 48 S. E., 796, 67 L. R. A., 977—1904.

The defendant, Jacobosky, as guardian of S. H. Weisel, signed an agreement, on March 13, 1903, giving the plaintiff an option on certain property. The paper states, "This option holds good from this date until April 13, 1903." S. H. Weisel was under age when the guardian signed the agreement, but becoming of age prior to April 23, 1903, he signed the paper on that day. The agreement was not complied with by the defendants, and this action was brought by the plaintiff to recover damages for the breach of contract. The defendant, Weisel, contended that he was not liable on the contract, and from a judgment against him, appealed.

CONNOR, J. The defendant, S. H. Weisel, insists that he was not a party to the contract when it was executed, and signed it without consideration after the option had expired, and that he is not bound thereby. It will be noted that the option expired April 13, 1903, and the contract was signed by Weisel, April 23. As to him it is without any consideration; he promised on April 23 to convey to the plaintiff the land on the 13th day of April of the same year, which is an impossibility. We can not see how it is possible for him to commit a breach of such agreement. The contract made by Weisel was impossible of performance, and of course there could never be a breach of it. "Physical impossibility means mere practical impossibility according to the state of knowledge of the day, as for example, a promise to go from New York to London in one day, or to discover treasure by magic, or to go around the world in a week." 9 Cyc., 326. "If one promise to do what can not be done, and the impossibility is not only certain but perfectly obvious to the promisee, as if the promise were to build a common dwelling house in one day, such a contract must be void for its inherent absurdity." 2 Parsons Cont., 673. (9 Ed.). "An agreement may be impossible of performance at the time it is made, and this in various ways. It may be impossible in itself, that is, the agreement itself may involve a contradiction, as if it contain promises inconsistent with one another, or with the date of the agreement." Pollock on Cont., 348. "Obvious and absolute physical impossibility, apparent upon the face of the promise and thus known to the parties, renders the promise void. Thus a charter party executed on the 15th of March, covenanting that the ship would proceed from where she then lay, on or before

the 12th of February, was held void." Beach on Mod. Cont., sec. 222.

The execution of the contract was not a ratification of his guardian's agreement and could not be, for the reason that the time within which the guardian had promised to sell was past, and for the further reason that his agreement, being against public policy, was void.

The exception of the defendant, Weisel, must be sustained and a new trial ordered as to him.

A made an exchange of lots with B, and alleged as a part of the consideration that B was to open a street leading to the lot. B did not own the land over which the street was to pass, and could not purchase it, nor could he control the city authorities and have them lay off a street, and A knew this; the promise was void for impossibility. Hall v. Fisher, 126—205.

See Clark Cont., 134; 1 Parsons Cont., 498; Joyner v. Crisp, 158—199; Nordyke & Marmon Co. v. Kehlör, 155 Mo., 643, 56 S. W., 287, 78 A. S. R., 600; The Harriman, 9 Wall., 172; Beebe v. Johnson, 19 Wend., 500, 32 A. D., 518; 9 Cyc., 326; Pollock Cont., 520.

For vague and indefinite consideration, see Certain and Definite Terms, *supra*; for illegal consideration, see Illegality of Object, *post*.

8. Past consideration.

(87) LITTLEJOHN v. PATILLO,

9 N. C., 302—1822.

Bill in Equity. The plaintiff owned a tract of land in Granville County on which the courthouse was erected, and there being some discontent on account of the plaintiff's owning all the land around the courthouse, the Legislature, with the assent of the plaintiff, appointed a commission to contract with him for fifty acres of the land, to build the town on. The plaintiff expressed his willingness, under the circumstances, to convey the land to the commissioners for such sum as they might think it was worth; and the commissioners declared their wish that the plaintiff have the full benefit of all the land would bring, and they made a private agreement among themselves, unknown to the plaintiff, that he was to receive such sum as the land might sell for in lots, above what they agreed to pay him for it. The contract was made for \$2,636, and a conveyance executed. The commissioners sold the lots for \$4,360, and took the bonds of the purchasers payable to the defendant as trustee for the county. The defendant assigned to the plaintiff bonds to the amount of \$2,636, and refused to assign the residue. The bill asked that the defendant be directed to collect the money and pay it to the plaintiff, or that he be required to assign the remaining bonds to the plaintiff.

TAYLOR, C. J. The bill does not make out a case which entitles

the complainant to relief. The contract of sale was completed between the parties, and the price, an indispensable ingredient in such contract, fixed and agreed upon. The additional sum now sought to be recovered entered in no degree into the views and calculations of the parties; there was no mutual agreement and understanding between them concerning it, and it could form no part of the inducement with the complainant to sell the land, for from him it was concealed till an after period; consequently no valid obligation to pay the money was incurred. If the commissioners, upon an after reflection, thought it an act of justice to allow the complainant the sum which the lots might sell for above the stipulated price, the performance of an agreement to that effect must be left to the same sense of justice by which it was prompted. But it may be doubted whether they could bind their principals by an agreement relative to a purchase which was then completed, and as to which their authority was *functus officio*, even if a valid contract had been made. If the agreement to pay this money could by any construction form part of the price of the land, then it can not be proved by *parol*; otherwise part of the contract would rest in deed, the other depend on the memory of witnesses, but the deed is the best evidence of what the contract was. It may be confidently inferred from this that, however strong the sentiment of justice might be under which the commissioners made the agreement, or however deliberate their purpose of fulfillment, they did not mean to subject themselves to legal responsibility. The law designs to give effect to contracts founded on the mutual exigencies of society and not to undertakings merely gratuitous, nor does equity differ in this respect. If damages are sought in the one court, the plaintiff must be able to state some valid legal contract, which the other party wrongfully refuses to perform; if a specific performance is sought here, the party must state some contract, legal or equitable, concluded between the parties which the other refuses to execute. But a *voluntary* conveyance (contract) can not be enforced in this court any more than damages can be given at law for the breach of a voluntary promise. 1 Ves., 133, 280; 3 Atk., 399; 18 Ves., 149. It would be impossible to frame a declaration at law upon the case made in this bill; the agreement was made amongst the commissioners themselves, and not with the complainant or anyone in his behalf; and the consideration, if any existed, was altogether passed and executed. Dyer, 272; 2 Strange, 933. It may therefore be said, as it has been in another case: "This agreement resting on private contract and honor may, perhaps, be fit to be executed by the parties, but can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be un-

faithful to his promise, but legal obligations are, from their nature, more circumscribed than moral duties." 1 H. Blackstone, 327. Let the bill be dismissed without costs.

(88) McDUGALD v. McFADGIN,

51 N. C., 89—1858.

PEARSON, C. J. . . . The point, as we understand it, is this: The plaintiff having sold and delivered to the defendants 600 barrels of No. 1 rosin, at an agreed price, afterwards undertakes, *i. e.*, warrants, without any further consideration, that the quality of the rosin is No. 1, according to the rates in the New York market. Is this subsequent undertaking binding, or is it void as a *nudum pactum*?

It clearly falls under the familiar doctrine of an executed or past consideration: Suppose I sell a horse, and the next day, without any consideration, agree to warrant that the horse is sound. Is not the warranty *nudum pactum*?

Judgment reversed.

(89) CRITCHER v. WATSON,

146 N. C., 150, 59 S. E., 544, 125 A. S. R., 470, 18 L. R. A. (N. S.), 270—1907.

CLARK, C. J. Action for recovery of rents, begun before a Justice of the Peace. The only exception is to the following charge of the court: "If defendant bought and paid for the window and frame and put it in the house, and, after that time, told plaintiff he had done so, and plaintiff could pay for it, or not, as he saw fit, and plaintiff ratified and accepted it, and plaintiff said he would pay for it, the plaintiff would be liable for the value of the window and frame, and defendant would be entitled to credit for the same."

The defendant could not put a betterment on the house without request, and, by such officious act, make the landlord his debtor. Nor, if the consideration was passed, would the promise of the plaintiff to pay therefor be binding, being gratuitous and without a consideration moving thereto. But the window and frame being a betterment to the house of future benefit, if the plaintiff "accepted the same and promised to pay for it" (as the court charged), there were all the elements of a valid contract, for the tenant had a right to remove all betterments affixed by him, if done without injury to the freehold. *State v. Whitener*, 93 N. C., 594, bottom of page, citing *Tyler on Fixtures*, pp. 384, 385, on the very point of the right of a tenant to remove windows placed by him in a windowless house. If, under such circumstances, the

plaintiff promised to pay for the window, this was ratification and acceptance.

This distinction reconciles the authorities. As the plaintiff contends, an executed or past consideration is no consideration to support an express promise in cases where the law does not raise an implied promise. 6 A. & E., 690, 693; *Allen v. Bryson*, 67 Iowa, 591. In *Bailey v. Rutjes*, 86 N. C., 522, Rutjes was lessee of the premises for five years, under a contract to make certain betterments. The plaintiff furnished the lumber to Rutjes for the purpose. He sued Rutjes and the lessors jointly, and the court held that unless the lessors "were originally liable by reason of a contract of some sort, they can not be made so because of their having resumed possession of the premises, with its improvements, upon the surrender of their tenant; . . . nor, under such circumstances, would a promise to pay, after the lumber had been furnished and used, be binding on them, since it would be purely gratuitous, and, as such, would make no contract."

But here the jury find that the plaintiff expressly agreed to pay for the window and frame their cost—\$1.72—and the only query is whether the promise is void for lack of consideration. If the only claim were that, at the expiration of the lease, as in *Bailey v. Rutjes*, the property passed to the plaintiff, with the window and frame added, there would be, as in that case, no liability of plaintiff, either to the maker of the window and frame, or to the defendant. And even if, after the expiration of the lease, when the house, with its betterments, had already passed back to the landlord, he had then made an express promise to pay for the betterment, this would have been unenforceable because *nudum pactum*, being a promise to pay for what had already become his property.

But here the express promise, which the jury find was made, was made during the tenancy. The tenant had a right to remove the window, if before he went out, provided this could be done without injury to the freehold. 24 Cyc., 1101. It does not appear that it would have been irremovable, for the jury find that the plaintiff promised to pay for it. If so, he must have desired to keep it there, and that it was desirable to keep it appears from the plaintiff's own testimony that "the room was 18 x 18 feet, with no light except from the door." Such a house was unsanitary and would be condemned by any board of health. Both parties testify that the conversation occurred during the tenancy and at the time when the defendant was doing work putting in the window, the plaintiff denying and the defendant affirming a promise to pay for the same.

A landlord can not be "improved" into a liability for improvements put upon his property by the tenant without authority. Nor

can anyone be held liable legally for a promise made without consideration; but here the betterment to the house was accepted at the time by the plaintiff, who promised to pay the \$1.72 for it, as the jury find. He has lost nothing, but still has the consideration of better light for a large room, which before had no light except from the door.

No error.

Where there is a rescission of the contract for land, there is an implied obligation to repay the purchase-money, and this would be sufficient consideration for a promise to pay. *Beaman v. Simmons*, 76—43; *Lewis v. Gay*, 151—168; but see, *Fulke v. Fulke*, 52—497. Where A did certain work for B, and after paying for it B complained that the charge was excessive, and A then agreed to refer the question to a third person, who decided in favor of B, A's promise was binding, being in the nature of a compromise of a right. *Findlay v. Ray*, 50—125.

A being indebted to B, gave a mortgage to secure the debt; B not being satisfied with the security, A gave an additional mortgage, but the debt was described as a new debt; when B's attention was called to it, he promised to correct it on the record, but failed to do so; B's promise was a *nudum pactum*. *Oldham v. Bank*, 85—240. A promise by the grantee, after the execution of deed, to convey to such person as the grantor should designate, is void without consideration. *Washington v. Blount*, 108—230; or to give a lien on the land for the purchase-money. *Latham v. Skinner*, 62—292. The guaranty of a contract by a third person, after its execution, is not binding unless there is some new consideration. *Grier v. Jones*, 52—581; *Green v. Thornton*, 49—230. In a claim for improvements on land under a parol contract of purchase, the improvements must have been placed there after the contract. *Johnson v. Armfield*, 130—575; *Luton v. Badham*, 127—96, *supra*, 64. *Bailey v. Rutjes*, 86—517, *supra*, 8.

See generally, 1 Page Cont., secs. 319, 320; 1 Parsons Cont., 506; Clark Cont., 137-142; 6 Am. & Eng. Encyc., 690; Trimble v. Rudy, 22 Ky., 1406, 60 S. W., 650, 53 L. R. A., 353, and note; see, moral obligation, *ante*.

Exceptions.—1. Where the past consideration was given at the request of the promisor, either express or implied; but it is then no consideration for any other promise than what the law would imply. 6 Am. & Eng. Encyc., 690-693; Clark Cont., 138.

2. Where one has done what another was legally bound to do, and the latter promises to pay for the same. This would not apply to purely voluntary payment, but only where the law would imply a promise. The liability of parish authorities for paupers in England, usually cited under this principle, is regulated by statute here. *Revisal*, 1327; *Copple v. Commissioners*, 138—127; *Edwards v. Branch*, 52—90.

3. A promise to revive an obligation which is unenforceable by reason of some law. Here the prior legal obligation is sufficient. 6 Am. & Eng. Encyc., 680, 681.

(1.) On account of incapacity.

(a.) If the contract is only voidable as in the case of infants, lunatics, etc., the original consideration is sufficient. *Ward v. Anderson*, 111—115.

(b.) But if the original contract is void, there must be a new consideration. Where a married woman made a contract not binding on her, and after the husband's death promised to pay the same; such promise is void without a new consideration. *Felton v. Reid*, 52—269; *Wilcox v. Arnold*, 116—708; but any new consideration, as forbearance or extension of time, would be sufficient. *Bank v. Bridgers*, 98—67; or if the transaction were of such a nature as to constitute an equitable charge on her separate property. *Long v. Rankin*, 108—333; *Gilbert v. Brown*, 29 Ky., L. R., 1248, 97 S. W., 40, 7 L. R. A. (N. S.),

1053; Lyell v. Walbach, 113 Md., 574, 77 Atl., 1111, 33 L. R. A. (N. S.), 741; Ferguson v. Harris, 39 S. C., 323, 3 A. S. R., 731, note; see, recent statute in N. C., 1911, ch. 109, as to married women's contracts.

Where the contract is void by reason of some prohibitory statute, the new promise is a *nudum pactum*; and a repeal of the statute would not make such promise good; as a promise to pay an unlicensed physician, Puckett v. Alexander, 102—95; or a parol contract of a corporation under sec. 683 of The Code. Spence v. Cotton Mills, 115—210; Jenkins v. Mfg. Co., 115—535.

(2.) On account of discharge in bankruptcy, or by statute of limitations; the unpaid legal obligation is sufficient to sustain a new promise. Kull v. Farmer, 78—339; Hornthall v. McRae, 67—21; Fraley v. Kelly, 67—78; Shaw v. Burney, 86—331; Conley v. Dunn, 167—32.

CHAPTER VI.

CAPACITY OF THE PARTIES.

Sec. 1. The government.

1. The United States.

(90) UNITED STATES v. TINGEY,

5 Peters, 115.

In a suit on a bond voluntarily given to the United States, and not required by any law, the question was presented, "Whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not provided for by some law."

Story, J., says: "Upon full consideration of this subject, we are of the opinion that the United States have such capacity. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the State governments within the proper sphere of their powers, unless brought into operation by express legislation."

The ordinary principles which apply to other contracts will apply also to government contracts. *Smoot's Case*, 15 Wall., 36; *Chicago R. R. v. U. S.*, 104 U. S., 680.

Power to sue and be sued.—The United States may sue in the courts as prescribed by law, but can be sued only with the consent of the government. *Carr v. U. S.*, 98 U. S., 433. The Court of Claims has power to try all cases upon contract, express or implied, with the government. *Nichols v. U. S.*, 7 Wall., 122.

2. The State.

(91) STATE *ex rel.* BRADDY v. SHIRLEY *et al.*,

23 N. C., 597—1841.

GASTON, J. This was an action of debt brought by, or in the name of, the State of North Carolina, upon the relation and to the use of Isaac B. Braddy against Geraldus Shirley, Charles G. Hun-

ter and David Barlow. The declaration averred that the defendants, by their writing obligatory, sealed with their seals and dated on the 1st day of March, 1836, acknowledged themselves to be held and bound unto the said State in the sum of \$4,000, with a condition underwritten, that if the above-bounden Geraldus, who had been appointed constable of the county of Edgecombe for the year 1836, should well and faithfully execute his said office of constable by executing all warrants put into his hands, and should faithfully pay over all moneys collected by him, the said Geraldus, by suit or otherwise, according to the acts of Assembly in such case made and provided, then the above obligation is void; and the declaration set forth that the said Geraldus had not complied with the condition aforesaid, but had broken the same in this, that he had in the said year 1836 collected the amount of a certain promissory note, which the relator had put into his hands, as constable, and had refused to pay over the same to the relator upon demand therefor made, and also in this, that on the 10th of April, 1836, the relator had put into his hands, as constable aforesaid, a certain other promissory note, which he had failed to collect, and which with due diligence he might have collected. The defendants craved *oyer* of the alleged obligation and condition, and, this being had, pleaded the general issue, conditions performed and not broken. Upon the trial the plaintiff exhibited the alleged writing obligatory, and gave in evidence, that on the 1st of March, 1836, Henry Austin, Esquire, one of the Justices of the Court of Pleas and Quarter Sessions of Edgecombe County, appointed the defendant, Shirley, constable of said county for the year 1836; that this appointment was made out of court; that, thereupon, the defendants subscribed, sealed and delivered to the said Austin the writing aforesaid as their deed; that the same was received by said Austin, and by him deposited with the Clerk of the County Court for safe keeping, where it remained until the institution of this suit; and further offered evidence to establish the breaches assigned. The counsel for defendants prayed the court to instruct the jury that the (alleged) bond was a nullity, and an action could not be maintained upon it; but the court, rejecting this prayer, instructed the jury that in law the bond was not a nullity, and that an action might be maintained upon it, if the defendant, Shirley, had been guilty of the breaches alleged. There was a verdict and judgment for the plaintiff, and the defendants appealed.

[The court here gives the statute in regard to the election and appointment of constable, showing that the appointment in this case was void, and that the Justices had no authority to accept the bond.]

The question of law presented by the case is, has there been a

delivery of this alleged bond? If there has not been, the instrument declared on was not the deed of the defendants. There has not been a delivery, unless the instrument has been accepted by some authorized agent of the State, or unless in law its acceptance can be presumed.

The State has undoubted capacity to receive a conveyance or an obligation; and this capacity can only be exerted through the medium of authorized agents. The authority, however, of these agents may either be expressly conferred, or may be incidental to other powers, and therefore comprehended within them. The cases of *Dugan v. U. S.*, 3 Wheat., 172, and *U. S. v. Tingey*, 5 Peters, 175 (115), which have been cited for the plaintiff, do not (?) establish this doctrine; and upon principle as well as authority, we have no hesitation in recognizing it thoroughly. But the magistrate who received this bond in behalf of the State acted wholly without authority. He not only had no express delegation of power to take it, but he was acting altogether *without his official sphere* in relation to the subject-matter. His acceptance of the instrument imparted to it no more validity than it would have received from the acceptance of any, the humblest, individual in the land. It is of the very essence of regulated liberty that the moment one entrusted with authority steps beyond its limits, his acts become the acts of a citizen, and are not those of a public agent.

The want of a precedent authority may, however, be supplied by a subsequent ratification. But none such is shown in this case. The Clerk of the County Court is entrusted with the keeping of the records of the court and other public documents; but he can not make an instrument a record or public document, which is not such, by placing it with the files among the records of his office. The suit is brought in the name of the State of North Carolina, but that name is used by an individual, as a relator, for his own benefit, upon the supposition that this instrument has been taken under the public authority; and, whether it was so taken or not, is the very question to be tried. But if the action had not been brought at the instance of a relator—if it had been instituted by the State through the Attorney-General—unless it was shown that *he* had authority to ratify the act of the individual, who, without authority, took the instrument as a bond—*this* would not have been a ratification by the State. The will of the State is only to be known, when declared through those appointed to declare it.

The remaining inquiry is, does the law presume an acceptance? The delivery of a deed to a third person for the use of a grantee is generally held to be a delivery to the grantee, until he express his dissent. This rule is founded upon the presumption that men do not refuse benefits, and therefore the law infers an acceptance

without requiring proof thereof. How far this rule is applicable to bodies politic—and especially to those of the highest dignity, States and sovereignties—which act only through the medium of others, and these ordinarily invested with special powers and required to act under these powers with prescribed formalities—on principle at least is not so clear. In the case of the *Bank of U. S. v. Dandridge and others* (12 Wheaton, 64), Chief Justice *Marshall* held that an instrument purporting to be a bond, given by a cashier and his sureties for the faithful performance of his duties to the institution, notwithstanding evidence that upon the execution of this instrument he was introduced into the bank as cashier and acted as such afterwards, and that this instrument was deposited among the muniments of the bank, as the cashier's official bond—was not the deed of the defendants, because not accepted by a formal resolution of the directors. His brethren, or a majority of his brethren on the Supreme Court Bench, dissented from this opinion, holding that the rule of presuming assent to benefits tendered applied to corporations as well as to individuals, or at all events, that their assent might be inferred from evidence short of that which would be required to bind them to onerous obligations. There are also decisions of courts of great respectability, in which, without evidence of formal acceptance, obligations made directly to a State, or to the United States, for the payment of money or the performance of other duties due to them in their corporate capacity, have been upheld as bonds on the ground of presumed acceptance. Among these, one of the strongest is that in the case of *United States v. Maurice and others*, 2 Brock., 96, in which Chief Justice *Marshall* reluctant as he avowedly was to give in to any laxity of principle, because of apprehended inconvenience, held an instrument executed by one, irregularly appointed to office, for securing the faithful collection and disbursement of public moneys, binding on the officer and his sureties. It would *seem*, therefore, that there are contracts and engagements so plainly and unequivocally beneficial to the State, that the law will not, in regard to them, require evidence of formal acceptance; but it is manifest that in the application of this rather latitudinous doctrine it is incumbent on the courts to exercise great caution, lest they should unwittingly take upon themselves a function confided by the fundamental law to a different part of the government, the function of determining what is and what is not for the good of the State.

The present case does not call upon us to draw this line of partition. The instrument before us does not profess to be made for the benefit of the State *as such*. It is avowedly made to secure the interests of all persons, who shall entrust the defendant, Shir-

ley, with the collection of debts, and made to the State as a trustee for these persons. True, the State may be said in common parlance to have an interest in the faithful performance of these duties, because the performance of them is for the advancement of right. But the State has not an interest therein in its proper character, *as a State*. If individuals may, without permission, thus make the State their trustee, what limit can be set to the exercise of this liberty? Why may not everyone—every firm, every voluntary association, every corporate body, nay, every foreign State, should they choose—take engagements for the protection of their interests in the name of the State? If this be done, is it not manifest that the State may become involved in responsibilities and duties, wholly alien from the legitimate purposes of government, and its honored name may be bandied about in the contests of private litigants. like the John Doe and Richard Roe in an action of ejectment? But there is yet a stronger objection to the presuming of an acceptance of this instrument by the State. By its constitutional organ, the Legislature, the State has declared when and through whose agency it will accept a trust of this character—who may take, and in what cases they may take a bond as payable and so conditioned as is the instrument now under consideration. This expression of the public will must be understood by us, whose duty it is to give it full effect as a denial of the power, thus specially delegated, to all other persons and in all other cases. Against this denial no presumption can be entertained.

It has been insisted, in argument for the plaintiff, that the precise ground on which we put our decision was not taken on the trial—that the objection made by the defendants was not to the incomplete execution of the instrument, but to its validity, supposing it executed. There is some foundation for this criticism—the point is not made as distinctly as it might have been presented. But nevertheless it manifests itself upon the case and can not be overlooked. Objection was taken to the bond as such *upon the general issue*—because of the circumstances under which the alleged execution took place—and defendants prayed of the court to instruct the jury to find upon this issue that it was not their deed. But instead of granting this prayer, the court instructed the jury that upon the evidence offered the plaintiff had maintained the issue on his part and was entitled to recover. If in *this* there was error, we are bound to reverse the judgment. *Grist v. Backhouse*, 20 N. C., 496.

It is not for us to say or intimate whether the relator has any remedy in any other court or in any other form. But it is our opinion that as the facts appear in this record there can not be a

judgment at law upon this instrument as the bond of the defendants.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

In Wall's Case, 24—267, the bond was held invalid because the record did not show that the officer had been elected by the people or appointed by the court. But in Pool's Case, 27—105, a bond not valid in its original execution for want of proper acceptance, was made valid by subsequent legislative enactment amounting to acceptance. In Battle v. Baird, 118—p. 860, citing Kello v. Maget, 18—414, an official bond found in the keeping of the proper officer was presumed to have been properly executed and accepted.

A bond can not be made payable to the State so as to protect the rights of the citizen, except in those cases provided by law, as in the case of guardians, etc. Dorsey v. R. R., 91—201.

A printing contract made by the State was construed in Stewart v. The State, 118—624; and a mistake in a settlement on such contract was corrected in Worth v. Stewart, 122—258. A printing contract by a committee of the Legislature was held invalid until executed as required by law. Capital Printing Co. v. Hoey, 124—767.

The State can not make a contract that interferes with the essential powers of government as in the creation of monopolies or exclusive rights. McRee v. R. R., 47—186; Bridge Co. v. Comrs., 81—491; Toll Bridge Co. v. Flowers, 110—386; Robinson v. Lamb, 126—492; Spease Ferry, 138—219.

Suits by and against the State.—Actions may be brought in the proper court and by the proper officer to enforce a right of the State. This is regulated by statute. Revisal, 5328, 5332, 5375, 5380.

"The Supreme Court shall have original jurisdiction to hear all claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action." Const., Art. 4, sec. 9; Revisal, 1537, 1538.

In an action for the return of bonds alleged to have been exchanged for other bonds, the State and not the treasurer is the proper party, and the Supreme Court has jurisdiction. Martin v. Worth, 91—45. Such jurisdiction extends only to such claims as involve a question of law, and issues of fact may be directed to be tried by a jury to facilitate the decision; but where only questions of fact are involved, application should be made to the Legislature, Reeves v. The State, 93—257; Bledsoe v. The State, 64—392; Reynolds v. The State, 64—460; Sinclair v. The State, 69—47; Miller v. The State, 134—270.

The manner of procedure when the court allows the claim is given in Clements v. The State, 77—142. The jurisdiction does not extend to claims which are prohibited by other sections of the Constitution, as bonds of 1868, etc. Horne v. The State, 84—362; Baltzer v. The State, 104—265; Cowles v. The State, 115—173.

The different departments and institutions are only agencies of the State, and can not be sued unless expressly authorized by law. Granville Co. Board of Education v. State Board of Education, 106—81; Chemical Co. v. Board of Agriculture, 111—135; Moody v. State Prison, 128—12.

A set-off strictly can not be allowed in an action by the State, because the defendant can not sue the State; but it may amount to a credit or payment. Battle v. Thompson, 65—406. In Henry v. The State, 68—465, the claim was for Judge's salary for services, and in Horne v. The State, 82—382, it was a claim for bonds and coupons past due.

In an action by the State provided by law, costs may be allowed against the State as the losing party. Blount v. Simmons, 120—19; but as to how this should be collected, see Garner v. Worth, 122—250.

In Cotten v. Ellis, 52—545, the court held that a mandamus might issue to the Governor requiring him to do a purely ministerial act,

here to issue a warrant to pay the salary of the Adjutant-General. But in *Boner v. Auditor and Treasurer*, 65—639, and *Bayne v. Treasurer*, 66—356, the writ was refused on the ground that the Legislature only could grant relief. In *White v. Ayer*, 126—570, the salary of the plaintiff was allowed by the court and a mandamus authorized to issue to the Auditor, to issue his warrant for it and to the Treasurer to pay it. Upon this decision a mandamus was issued by the Court and the claim was paid, although there was a special act of the Legislature providing that the claim should not be paid. This conflict of authority led to impeachment proceedings, found in *Pub. Doc. 1901*, vol. 2.

For an instance of a suit by one State against another, see *South Dakota v. North Carolina*, 192 U. S., 286.

Office as a contract.—In *Hoke v. Henderson*, 15—1 (1833), it was held that a public office is property; if existing under the Constitution, the Legislature can not destroy or change it; if only legislative, it may be abolished or the salary changed for the good of the public, but it can not be transferred to another during the term of the holder nor the emoluments taken away for the purpose of forcing a vacancy. This made an office a contract between the State and the office-holder. The same doctrine was held in *Cotton v. Ellis*, 52—542; *State v. Smith*, 65—369; *King v. Hunter*, 65—603; *Clark v. Stanly*, 66—59; *Bailey v. Caldwell*, 68—472; *Vann v. Pipkin*, 77—408; *Bunting v. Gales*, 77—283; *Prairie v. Worth*, 78—169; *Trotter v. Mitchell*, 115—190. The "Office-holding Cases" growing out of the change in the political situation began with *Wood v. Bellamy*, 120—212 (1897), sustaining *Hoke v. Henderson*, and continued in *Ward v. Elizabeth City*, 121—3; *Caldwell v. Wilson*, 121—425; *Day's Case*, 124—362; *Bryan v. Patrick*, 124—651; *Wilson v. Jordan*, 124—683; *White v. Hill*, 125—194; *Green v. Owen*, 125—212; *McCall v. Webb*, 125—243; *Abbott v. Beddingfield*, 125—256; *Dolby v. Hancock*, 125—325; *Gattis v. Griffin*, 125—332; *White v. Ayer*, 126—570; *Taylor v. Vann*, 127—243. In 1903, *Hoke v. Henderson* was overruled in *Mial v. Ellington*, 134—131.

3. Municipal corporations.

Const., art. 7, sec. 7. No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein.

(92) FAWCETT v. MT. AIRY,

134 N. C., 125, 45 S. E., 1029, 63 L. R. A., 870, 101 A. S. R., 825—1903.

MONTGOMERY, J. Whether a city or town has the right to incur an indebtedness for the erection and operation of plants for the supply of water and electric lights for municipal use and to sell to its inhabitants is a necessary municipal expense, is the question again presented to us for decision. Indebtedness incurred by a city or town for a supply of water stands on the same footing as indebtedness incurred for lighting purposes, and if such indebtedness be a necessary expense, then whether or not a municipality may incur it, does not depend upon the approval of the proposition by a majority of the qualified voters of the municipality. It is only in cases where counties, cities or towns undertake to contract debts

or pledge their faith, or loan their credit or levy taxes, except for the necessary expenses thereof, that the submission of the proposition must be made to a vote of the qualified voters of such county, city or town. *Wilson v. Comrs.*, 74 N. C., 748; *Tucker v. Comrs.*, 75 N. C., 274.

It is almost impossible to define in legal phraseology the meaning of the words "necessary expense" as applied to the wants of a city or town government. A precise line can not be drawn between what are and what are not such expenses. The consequence is that as municipalities grow in wealth and population, as civilization advances with the habits and customs of necessary changes, the aid of the courts is constantly invoked to make decisions on this subject. In the nature of things it could not be otherwise; and it is not to be expected, in the changed conditions which occur in the lives of progressive people, that things deemed unnecessary in the government of municipal corporations in one age should be so considered for all future time. In the efforts of the courts to check extravagance and to prevent corruption in the government of towns and cities, the judicial branch of the government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress, sometimes appears at a serious disadvantage.

On this subject this court, in *Wilson v. Comrs.*, *supra*, uses the following instructive and suggestive language:

"The analogy of the law for the necessities of infants is the only one that occurs to us. It is held that if, considering the means and station of life of the infant, the articles sold to him may be necessary under any circumstances, they come within a class for which the infant may be liable, and upon his refusal to pay it is for a jury to determine whether under the actual circumstances they were necessary. If, however, the articles are merely ornamental and such as can not under any circumstances be necessary to one of the means and station of the infant, the court may as a matter of law declare that the infant is not liable. We do not undertake to say that this analogy will furnish a rule which will admit of a close application. But if treated merely as an analogy in the absence of other guides, it may be of some general use."

It seems strange that it should be declared by some of the courts of highest reputation that the purchase of a town clock or hay scales or a pump is a necessary expense, when the supply of light to enable its citizens to walk its streets in security, or a supply of wholesome water to prevent disease and suffering, should be held as not a necessary expense. It is pretty generally held by the

courts that the expense incurred for widening the streets is a necessary expense, that a market-house is a necessary expense, and surely if that be sound law the courts ought to hesitate before they would pronounce a debt incurred for the furnishing of light and water not to be a necessary expense. And it seems to us that it may be reasonably considered as certain that the words "necessary expense" do not mean expenses incurred or to be incurred for purposes or objects that are only for the procurement or maintenance of things absolutely essential to the existence of the municipality. The expenditure of money for the widening of streets, the erection of market-house, town clocks and hay scales are all considered as necessary expenses, and those things are not essential to the life of the municipality. A city or town might be fairly well governed and be prosperous without having appointed and fixed particular places for the sale of market produce, or without keeping the time of day, or weighing grain and fodder; and certainly expenses incurred for water and light are more necessary than those for a market-house, clocks and scales. The words "necessary expense," then, must mean such expenses as are or may be incurred in the establishing and procuring of those things without which the peace and order of the community, its moral interests and the protection of its property and that of the property and persons of its inhabitants would seriously suffer considerable damage, leaving out of view the matter of the great inconvenience that would be attendant upon our present social life for want of such expenditures. The use of water from wells dug in populous communities is proscribed by the recent progress made in the science of bacteriology, the practical lessons of that science having been learned by the people generally.

It is of common knowledge that the most fearful scourges of certain most dangerous forms of fever arise from the use of water from wells in towns and cities; and it is out of the power of individuals in towns and cities to erect and operate appliances for supply of water. As to the question of lighting the streets and public places, the experience of all who live in towns and cities of any considerable population is that without lights upon the streets and in the public buildings both life and property would be insecure, to say nothing of the almost complete destruction of the conveniences of life and the marring of its social features. The fire department, probably the most important of the municipal departments, would be rendered ineffective, and a considerable part of the commerce—trade of the country—would be destroyed; for under our changed conditions a good deal of the traffic between different communities and a respectable part of our mail service are conducted at night. It will not do to say that a city or town may expend money or

incur a debt for the purchase of lights by the month or year, but that it may not incur a debt for the construction and operation of a system of waterworks or for the installment of an electric plant for lighting. If the matter of lighting is a necessary expense, then how and in what manner the city shall furnish such lighting is with the authorities of the city or town to determine. The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition "necessary expenses." The governing authorities of the municipal corporations are vested with the power to determine when they are needed, and, except in cases of fraud, the courts can not control the discretion of the commissioners.

Our conclusion, then, is that an expense incurred by a city or town for the purpose of building and operating plants to furnish water and lights is a necessary expense, and is not such a debt as must be submitted to a popular vote before it can be incurred, under section 7 of Article VII of the Constitution; and that under the general law of North Carolina in respect to cities and towns, The Code, secs. 3800 and 3821, municipal corporations may contract such debts and provide for their payment, unless there is some feature in the charter of such city or town which forbids it.

The power to light the streets and public buildings and places of a city is one of implication, where it is not specially conferred, because the use of such power is necessary to fully protect the lives and comfort and property of its inhabitants. It is a most important factor, too, in the preservation of the peace and order of the community. *Croswell Law of Elect.*, sec. 190; *Mauldin v. Greenville*, 33 S. C., 1, 8 L. R. A., 291; *Lot v. Waycross*, 84 Ga., 681. In the case of *Crawfordsville v. Braden*, 136 Ind., 157, 14 L. R. A., 268, 30 Am. St. Rep., 214, the court said: "So far as lighting the streets, alleys and public places of a municipal corporation is concerned, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some statutory restriction, they may in their discretion provide that form of light which is best suited to the wants and financial condition of the corporation." It is well settled that the discretion of municipal corporations within the sphere of their powers is not subject to judicial control, except in cases where fraud is shown, or where the power and discretion are grossly abused to the oppression of the citizen. We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing the power to do the lighting, that power carries with it incidentally

the further power to procure or furnish whatever is necessary for the production and dissemination of the light.

The cases on this subject heretofore decided by this court to the contrary of the present decision, one of which was written for the court by this writer, are overruled. The conclusion to which the present Chief Justice arrived in *Mayo v. Comrs.*, 122 N. C., 5, 40 L. R. A., 163, is the conclusion at which we have arrived in this case.

In the case before us the defendant, the town of Mount Airy, was authorized by an act of the General Assembly at its session of 1901, Private Acts, chap. 216, to submit to the qualified voters of the town the question of issuing \$50,000 of town bonds for the purpose of defraying the expenses of constructing a system of waterworks and installing an electric plant to furnish the town with water and light. The question was submitted and carried, and the bonds were issued and sold. The proceeds were applied for the purposes mentioned in the act, but were insufficient to complete the plants. The Board of Aldermen of the town then passed an ordinance that they do borrow the sum of \$15,000 upon pledging repayment by issuing bonds of like amount with interest.

The plaintiffs commenced this action to enjoin the issuing of the bonds, and the injunction was granted by His Honor, Judge McNeill, and the defendant appealed. His Honor followed the decisions of this court, and the error he committed was not his own; but it was error, nevertheless. Reversed.

Counties, cities, towns, townships, school districts, etc., are only organizations for the purpose of carrying out the objects of government, their powers are fixed by the Constitution and statutes, and they are subject to the legislative will. *White v. Comrs.*, 90—437; *McCormac v. Comrs.*, 90—441; *Dare v. Currituck*, 95—189; *Manuel v. Comrs.*, 98—9; *Tate v. Comrs.*, 122—812; *Prichard v. Comrs.*, 126—908; *Bell v. Comrs.*, 127—85; *Moody v. State Prison*, 128—12; *McIlhenny v. Wilmington*, 127—150; *Jones v. Comrs.*, 130—451; 137—p. 596; *Comrs. v. Trust Co.*, 143—110.

So where the township trustees were authorized to levy and collect taxes to pay necessary expenses, and certain debts were thereby contracted, and then the power was taken away and another method of payment provided, the trustees can not proceed further, and the remedy of the creditor is through the Legislature. *Mitchell v. Trustees*, 71—400; *Wallace v. Trustees*, 84—164.

Contracts for necessary expenses.—The county commissioners have the right to contract for the payment of the necessary expenses of the county without a popular vote, but not for other purposes, and the Legislature can not authorize them to do so. *McCless v. Meekins*, 117—34. But it seems that where the Legislature authorizes the municipal corporation to contract the debt by first submitting the question to a popular vote, this vote is a necessary condition. *Wadsworth v. Concord*, 133—587; *Asheville v. Webb*, 134—72; *Robinson v. Goldsboro*, 135—382, which were electric light cases, and *Greensboro v. Scott*, 138—181 (waterworks), where a similar provision as to popular vote had been abrogated by a subsequent act. See also *Vaughan v. Comrs.*, 117—429 (courthouse); *Swinson v. Mt. Olive*, 147—611; *Burgin v. Smith*, 151—561.

Bridges.—Broadnax v. Groom, 64—244; Satterthwaite v. Comrs., 76—153; Evans v. Comrs., 89—154; Greenleaf v. Comrs., 123—30; McPeters v. Blankenship, 123—651. **Roads and bridges.**—Paine v. Caldwell, 65—488; Bridge Co. v. Comrs., 111—317; Herring v. Dixon, 122—421; Tate v. Comrs., 122—812; Glenn v. Comrs., 139—412; Crocker v. Moon, 140—429. **Streets.**—Wilson v. Charlotte, 74—758; Tucker v. Raleigh, 75—267; Young v. Henderson, 76—420; Stratford v. Greensboro, 124—127; Merrimon v. Paving Co., 142—539. **Courthouse.**—Halcombe v. Comrs., 89—346; Long v. Comrs., 76—273; Vaughan v. Comrs., 117—429. **Guard-house or jail.**—McLin v. New Bern, 70—12. **Markethouse.**—Smith v. New Bern, 70—14. **Paying officers, etc.**—Gardner v. New Bern, 98—228. Waterworks and electric lights were held not to be necessary expenses in Charlotte v. Shepard, 120—411; Mayo v. Comrs., 122—5; Thrift v. Elizabeth City, 122—31; Edgerton v. Water Co., 126—93. These are overruled by the principal case, which is sustained in Davis v. Freemont, 135—538; Hightower v. Raleigh, 150—569 (municipal building); Burgin v. Smith, 151—651 (courthouse); Bradshaw v. High Point, 151—517 (waterworks); Comrs. v. Webb, 148—120; Hendersonville v. Jordan, 150—35 (streets); but public schools are not a necessary expense of a municipal corporation. Hollowell v. Borden, 148—255; Moran v. Comrs. (N. C.), 84 S. E., 402.

Majority of qualified voters.—Where the contract is not for necessary expense, the popular vote is necessary. The imperative requirement of the Constitution is that there shall be a concurrence of the legislative and popular will; the former evidenced by authority to vote, the latter by the record that a majority of the qualified voters have voted favorably. Claybrook v. Comrs., 114—453; 117—456; Bank v. Comrs., 116—339; R. R. v. Comrs., 116—563. This provision means not merely a majority of those voting, but a majority of the registered voters. Reiger v. Comrs., 70—319; R. R. v. Comrs., 72—486; Norment v. Charlotte, 85—387; Southerland v. Goldsboro, 96—49; Duke v. Brown, 96—127; McDowell v. Construction Co., 96—514; Rigsbee v. Durham, 98—81; 99—341; Smith v. Wilmington, 98—343; R. R. v. Comrs., 109—159. It is sufficient if a majority actually vote, whether required by the act or not. Wood v. Oxford, 97—227; and the finding by the proper authorities that a majority did vote is *prima facie* correct, and can not be questioned collaterally. Rigsbee v. Durham, 98—81; 99—341. Special legislation is necessary to authorize a tax levy above that provided in the Constitution, but it does not need the popular vote. Cases above cited.

Where municipal authorities have the discretion, the courts can not control the exercise of it in the absence of fraud, Broadnax v. Groom, 64—244; Long v. Comrs., 76—273; Burwell v. Comrs., 93—73; Greenleaf v. Comrs., 123—30. But the commissioners of a county can not bind themselves by a contract to maintain perpetually a certain road or bridge so as to give a citizen a cause of action against them for breach of contract; since their discretion must be used for the public good. Glenn v. Comrs., 139—412. The power to borrow money is not necessarily incident to the power to contract for necessities. Davis v. Comrs., 74—374; Daniel v. Comrs., 74—494.

County commissioners may contract for the services of an attorney, Raper v. Laurinburg, 90—427; Hancock v. Comrs., 132—209; Wilmington v. Bryan, 141—666.

Caring for the poor.—There must be an express contract, or the service must be rendered at the request of the commissioners, express or implied. Copple v. Comrs., 138—127. Between counties the statute fixes the liability. The Code, 3544; Revisal, 1333, 1334; Burke v. Buncombe, 101—520; McDowell v. Forsyth, 121—295.

An account against the county must be itemized and verified. Revisal, 1385; and its allowance by the commissioners is only *prima facie* evidence that it is correct. Abernethy v. Phifer, 84—711; Turner v. McKee, 137—251. County orders must be presented within two years. Revisal,

396; *Royster v. Comrs.*, 98—148; and they are not negotiable. *McPeeters v. Blankenship*, 123—651.

A county can not mortgage the public property. *Vaughan v. Comrs.*, 118—636; nor can the commissioners delegate their authority. *McPhail v. Comrs.*, 119—330. A town can not sell land dedicated as a street and with reference to which lots have been bought, though the street was not used and the Legislature authorized the sale. *Moose v. Carson*, 104—431; *Church v. Dula*, 148—262.

(93) BANK OF RICHMOND v. COMMISSIONERS OF OXFORD,

119 N. C., 214, 25 S. E., 966, 34 L. R. A., 487—1896.

This was a civil action on a bond issued by the town of Oxford for building a railroad. There was a judgment for the plaintiff, and defendant appealed.

CLARK, J. When this case was here before (116 N. C., 339), the court set aside the nonsuit taken below and held that the plaintiff could maintain an action as the case was then presented. The court did so upon the ground that, there being apparently a valid liability of \$40,000 against the town of Oxford, the compromise thereof for the sum of \$20,000 was not necessarily void, and that the court below erred in nonsuiting the plaintiff. The case had been tried upon the view that the charter of the town of Oxford authorized the election under which the \$40,000 indebtedness was contracted. The Judge below held that this was not so, and hence that the compromise was not binding. This court sustained the view taken below, that the town charter did not authorize the contraction of the indebtedness, but held that, on its face, the act chartering the railroad (Acts 1891, ch. 315, sec. 10), authorized the election. The question as to the efficacy of that act had not been questioned below, as the plaintiff had rested its claim upon the authority of the town charter to sustain the election.

The questions decided before need not be called in controversy. We must take it that our former opinion settles that the town had authority to compromise a valid liability for a smaller sum, and that the Act of 1891, ch. 315, on its face, authorized the election. When the second trial was had below the point was taken for the first time, that, conceding, as this court had held, that the Act of 1891, ch. 315, by its terms authorized the election, that act was invalid because not passed as required for all acts empowering counties, cities and towns to issue bonds. The Constitution, Art. II, sec. 14. This section of the Constitution is imperative and not recommendatory, and must be observed; otherwise this wise and necessary precaution inserted in the organic law would be converted into a nullity by judicial construction. It was intended as a safeguard, and has been held mandatory in all other courts in

which that question has been presented, as will be seen below. This point was not raised below in the former trial, nor in this court, as the plaintiff was then relying upon the charter of the town, which we held invalid for that purpose. On the second trial, when the plaintiff offered for the first time the Act of 1891, ch. 315, as authority to show a valid election authorizing the indebtedness of \$40,000 as a basis to authorize the compromise (for, except as a compromise, the judgment would be void on its face, being *ultra vires*), the defendant contended that the Act of 1891, ch. 315, while valid as a railroad charter, was unconstitutional and void, so far as authorizing the creation of an indebtedness by the town, because not enacted in the manner required by the Constitution, Art. II, sec. 14. The Journals were put in evidence and showed affirmatively that the act was not read three several days in each House, and that the ayes and noes were not entered on the readings in the House, as required by the Constitution for acts authorizing the creation of public indebtedness. The point, therefore, arises for the first time in this case, and was not presented and could not be presented in the former appeal for the reasons above given. The point is one of transcending importance, and is simply whether the people, in their organic law, can safeguard the taxpayers against the creation of State, county and town indebtedness by formalities not required for ordinary legislation, and must the courts and the Legislature respect those provisions. This safeguard is section 14 of Article II of the Constitution. It provides: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays, on the second and third readings of the bill, shall have been entered on the Journal." The Journals offered in evidence showed affirmatively that "the yeas and nays on the second and third reading of the bill" were not "entered on the Journal." And the Constitution, the supreme law, says that, unless so entered, no law authorizing State, counties, cities or towns to pledge the faith of the State or to impose any tax upon the people, etc., shall be valid.

This case has no analogy to *Carr v. Coke*, 116 N. C., 223. That merely holds that when an act is certified to by the Speakers as having been ratified, it is conclusive of the fact that it was read three several times in each House and ratified. Const., Art. II, sec. 23. And so it is here; the certificate of the Speakers is con-

clusive that this act passed three several readings in each House and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each House and that the yeas and nays were entered on the Journals. The Journals were in evidence and showed affirmatively the contrary. The people had the power to protect themselves by requiring in the organic law something further, as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns, than the fact certified to by the Speakers of three readings in each House, and ratification. This organic provision plainly requires, for the validity of this class of legislation, in addition to the certificates of the Speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the Journals on the second and third readings in each House. It is provided that such laws are "no laws," *i. e.*, are void unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal. This is a clear declaration of the nullity of such legislation unless this is done, and every holder of a State or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of his bond. If he buys without ascertaining that constitutional authority to issue the bond has thus been given, he has only himself to blame. 1 Dill. Mun. Corp., 545, and cases cited. It is certainly in the power of the sovereign people in framing their Constitution to require as a prerequisite for the validity of this class of legislation these precautions and the additional evidence in the Journals that they have been complied with, over and above the mere certificate of the Speakers which is sufficient for other legislation. That the organic law does require the additional forms and the added evidence of the Journals is plain beyond the power of controversy. Accordingly, the law is well settled by nearly one hundred adjudicated cases in the courts of last resort in thirty States, and also by the Supreme Court of the United States, that where a State Constitution prescribes such formalities in the enactment of laws as require a record of the yeas and nays on the legislative Journals, these Journals are conclusive as against not only a printed statute published by authority of law, but also as against a duly enrolled act.

[The court here gives a list of the authorities to sustain the above position.]

Constitutional requirements as to the style of acts or the manner of their passage are mandatory, not directory. *State v. Patter-*

son, 98 N. C., 660, 663, 665. 'The thirty days' notice required before the passage of a private act is not required by the Constitution to be entered on the Journals, as is required as to the readings on several days, and the ayes and noes on each reading, with bills authorizing the contraction of public indebtedness, and hence it may be that the giving of such thirty days' notice is conclusively presumed as to such private acts (Harrison v. Gordy, 57 Ala., 49; Walker v. Griffith, 60 Ala., 361), though the contrary was intimated in Gatlin v. Tarboro, 78 N. C., 119.

The history of the country at large, and of this State as well, has shown the necessity of this safeguard as to acts authorizing the creation of public indebtedness, which has been incorporated also into several other State Constitutions. We have no power nor wish to nullify so plain and mandatory a provision, so carefully and explicitly worded, and which has been held binding by all other courts wherever the question has been presented.

The judgment on its face is by consent and for a railroad subscription. It is therefore on its face to be treated as void, being *ultra vires*, unless a special authority is shown authorizing the indebtedness for which it was a compromise (Kelly v. Milan, 127 U. S., 150); for, *ex virtute officii*, town commissioners have no authority whatever to bind the town by submitting to a consent judgment for \$20,000 for a matter appearing on the face of the judgment to be not for town purposes. If the commissioners of the town were vested with no authority to create the debt, they certainly could not acquire such power by entering into a consent judgment.

[The court here discusses the effect of such consent judgment, showing that it could have no more effect than the obligation on which it was founded in this case; citing Kelly v. Milan, *supra*, and other cases.]

The Constitution makes the entry on the Journals essential to the validity of the act. If it be conceded that presumption of regularity arises from the publication of the act in this case it was rebutted, for the Journals were offered by the defendant, and showed that no constitutional authority had been conferred to issue the bonds or contract the indebtedness. It is incumbent upon the purchaser of municipal bonds to examine whether the power to issue has been duly granted. Lake v. Graham, 130 U. S., 674; East Oakland v. Skinner, 94 U. S., 255; 1 Dillon Mun. Corp., 245. The bonds having been issued without authority, were absolutely void. Marsh v. Fulton Co., 10 Wall., 676; Clark v. Hancock Co., 27 Ill., 305. The payment of interest is no ratification, for there can be no ratification when there is want of power. Doon v. Cummins, 142 U. S., 376; Davies Co. v. Dickinson, 117 U. S.,

657, 665; Norton v. Shelby Co., 118 U. S., 425, 451; Lewis v. Shreveport, 108 U. S., 282, 287.

In instructing the jury upon the evidence to find the issues in favor of the plaintiff there was error. Error.

Faircloth, C. J., dissents.

This case has been followed in numerous other cases. *Charlotte v. Shepherd*, 120—411; 122—602; *Comrs. v. Snuggs*, 121—394, 39 L. R. A., 439, 190 U. S., 437; *Rodman v. Washington*, 122—39; *Comrs. v. Call*, 123—308, 44 L. R. A., 252, 180 U. S., 506, 190 U. S., 107; *Comrs. v. Payne*, 123—432; *McGuire v. Williams*, 123—349; *Smathers v. Comrs.*, 125 480; *Glenn v. Wray*, 126—730; *Comrs. v. DeRossett*, 129—275; *Black v. Comrs.*, 129—121; *Hooker v. Greenville*, 130—472; *Pritchard v. Comrs.*, 160—476; *Debnam v. Chitty*, 131—657, holding that the affirmative and negative votes should both be entered on the Journal, but this was overruled in *Comrs. v. Trust Co.*, 143—110, holding that it is sufficient if the affirmative votes are entered and there is a majority. *Graves v. Comrs.*, 135—49, discusses the decision of the Supreme Court of U. S. in the above cases, and also the validity of township bonds. As to township bonds, see also *Brown v. Comrs.*, 100—92; *Jones v. Comrs.*, 107—248. School districts may issue bonds, *Smith v. Trustees*, 141—143.

In *Jones v. Comrs.*, 137—579, an act of the Legislature "authorizing and empowering" a county to issue bonds to pay its debts for necessary expenses, is considered mandatory; overruling 135—218 and 135—230.

Sec. 2. Private corporations.

1. Organization the result of contract.

(94) MILLS v. WILLIAMS,

33 N. C., 558—1850.

This was an action of trespass *vi et armis*, for an assault and battery. The county of Polk was organized by act of the Legislature of 1846, and the defendant was elected and qualified as sheriff of the county. The act creating the county was repealed in 1848, and the defendant arrested the plaintiff on a writ which was issued and came to his hands in 1849. The defendant contended that the repealing act was unconstitutional. There was a judgment for the plaintiff, and defendant appealed.

PEARSON, J. In 1846, the Legislature established a county by the name of "Polk." In pursuance thereof justices of the peace were appointed, courts organized, and a sheriff and other county officers elected, who entered upon the discharge of the duties of their respective offices. In 1848 the Act of 1846 was repealed, and the question is presented, has the Legislature a right, under the Constitution, to repeal an act by which a county is established?

From the formation of our State government, the General Assembly has, from time to time, changed the limits of counties, and has over and over again made two counties out of one, so that, in

many instances, even the name of the old county has been lost; and it would seem to an unsophisticated mind that where there is power to make two out of one, there must be the corresponding power to make one out of two. In other words, as the Legislature has, undoubtedly, the power to divide counties, where they are too large, that there is the same power to unite them, when they are too small; the power in both cases being derived from the fact that by the Constitution "all legislative power is vested in the General Assembly," which necessarily embraces the right to divide the State into counties of convenient size, for the good government of the whole. Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give to it more importance than it deserves, as a *dry question of law*; and the unusual amount of labor and learning bestowed on it, has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers, and having such capacities, as may be given to it by its maker. The purpose in making all corporations is the accomplishment of some *public good*. Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefited, it is no more lawful to confer "exclusive rights and privileges" upon an artificial body than upon a private citizen.

The substantial distinction is this: some corporations are created by the *mere will* of the Legislature, there being *no other party interested or concerned*. To this body a portion of the power of the Legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.

Other corporations are the result of contract. The Legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party*. These two parties make a *contract*. The Legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. *It is a contract*; and, therefore, can not be modified, changed or annulled without the consent of both parties.

So, corporations are either such as are independent of all contracts, or such as are the fruit and direct result of a contract.

The division of the State into counties is an instance of the former. There is no contract—no *second party*, but the sovereign,

for the better government and management of the whole, chooses to make the division in the same way, that a farmer divides his plantation off into fields and makes cross fences, where he chooses. The sovereign has the same right to change the limits of counties, and to make them smaller or larger by putting two into one, or one into two, as the farmer has to change his fields; because it is an affair of his own, and there is no second party, having a direct interest.

A railroad is an instance of the latter—certain individuals propose to advance capital, and make a road by which it is supposed the public are to be benefited, in consideration that the Legislature will incorporate them into a company with certain privileges. The bargain is struck; neither party has a right to modify, change, annul, or *repeal* the charter without the consent of the other; and (still to borrow an illustration from the farmer), he has in this case *leased* out his field at a certain rent, and has no right to make one larger and another smaller, without the consent of his tenant.

Roads furnish another familiar illustration. The County Court has a public road laid out, and an overseer and hands appointed. It may be altered or discontinued by the county authorities, and the overseer and hands have no direct interest or right to be heard in the matter, except as other citizens. But if the Legislature, instead of acting by its agent, the county authorities, choose to make a contract with certain individuals, that if they will raise funds and make a road they shall be incorporated with the right to exact tolls, etc., then the road can not be altered or discontinued without the consent of the corporation.

When a county is established, it is done at the mere will of the Legislature, because, in its opinion, the public good will be thereby promoted. There is *no second party directly* interested or concerned. There is no contract, for no consideration moves from any one, and without a consideration, there can not be a contract. The discharge of certain duties by the persons, who are appointed justices of the peace, or sheriff, clerk, or constable, can, in no sense of the word, be looked upon as a consideration for establishing the county. In legal parlance, the "consideration is past"—the thing is done, before their appointment. Some act for the honor of the station; others for the fees and perquisites of office, but their so doing did not form a consideration for the erection of the county, and is a mere incident to their relation as citizens of the county.

It was ingeniously argued, that, upon the erection of a county, certain rights attach by force of the Constitution, as the right to have at least one member in the House of Commons; and as these rights are conferred by the Constitution, it is insisted that having

attached, it is not in the power of the Legislature to take them away.

The argument is based upon a fallacy. It is true, the Constitution invests every county with certain rights, as incident to its existence as a county. But by no sound reasoning can the incident be made to override the principal; and the Constitution, by conferring these incidental rights, can not be, by any fair inference, made to interfere with the control of the Legislature on the subject of counties, as instruments for the good government and management of the whole State.

The Constitution preordains these rights, but they are put expressly as incidents to the existence of counties; and although they may very properly enter into the question of expediency, they have no legislative bearing upon the power to create and abolish counties, as may to the wisdom of the Legislature seem fit. Such statutes are not the result of contracts. There is no second party, who pays a consideration, which is the essence of every contract. *Turrett v. Taylor*, 9 Cranch, 43; *Dartmouth College v. Woodward*, 4 Wheaton, 663; *Phillips v. Bury*, 2 T. R., 346.

Per Curiam.

Affirmed.

See also *Fertilizer Co. v. Clute*, 112—440. In *Dartmouth College Case*, cited above, the court held that to change the charter without the consent of the members of the corporation would be impairing the obligation of a contract. As to the effect of a change upon the stockholders, see *Bank v. Charlotte*, 85—433. Changes in the charters are now regulated by Const., Art. VIII, sec. 1. "All general laws and special acts passed, pursuant to this section, may be altered from time to time or repealed." Revisal, 1135, 1136; *Womack on Corp.*, p. 32 *et seq.*; *Clark on Corp.*, p. 50 *et seq.*

2. Express and implied powers of contract.

(95) *WISWALL et al. v. PLANK ROAD CO.*,

56 N. C., 183—1857.

This was a bill in equity, by the plaintiffs as stockholders in the Greenville and Raleigh Plank Road Company, to restrain the company from investing surplus funds in a stage line and making a contract to carry the mails.

PEARSON, J. It was conceded in the argument that a corporation has a right to restrain by injunction the incorporators from doing any act which is not embraced within the scope and purpose for which the corporate body was created, and which would be a violation of the charter; not only on the ground that such act would operate injuriously upon the rights and interests of the incorporators, but on the further ground that a forfeiture of the charter would be thereby incurred.

So, the only question made by the demurrer is this: Has the company power to purchase stages and horses to be run upon the said roads? and has it likewise power to enter into a contract to carry the United States mail on the road by means of such stages? This question must be decided by a construction of the charter. We have examined it, and declare our opinion to be, that no such power is given to the company.

The first section sets out the object of the incorporation, to wit, "for the purpose of effecting a communication by means of a plank road from Greenville to Raleigh."

The third section grants the franchise of incorporation, and gives all the powers, rights and privileges necessary "for the purposes mentioned in this act."

The ninth section invests the president and directors of the company "with all the rights and powers necessary for the construction, repair and maintaining of a plank road to be located as aforesaid."

The fourteenth section provides for the erection of toll-houses and gates.

The fifteenth section provides for the collection of toll to be "demanded and received from all persons using the said plank road," with a proviso that the tolls shall be so regulated that the profits shall not exceed twenty-five percent on the capital in any one year.

These sections contain the substantive provisions; the others merely embrace the details necessary for the formation of the company, etc.

The mere statement makes the question too plain for observation. If, under the power to construct, repair and maintain a plank road, a power can be implied to buy stages and horses and become a mail contractor, the company, by a parity of reasoning, has an implied power to set up establishments at convenient points along the road for the purchase of produce to be carried over its road. Besides, how are tolls to be demanded and received, and how are the profits of this enlarged operation to be regulated? How are losses from such speculations to be guarded against?

It may as well be contended that a turnpike company, from its power to construct, repair and maintain the road, has, by implication, power to embark in the business of mail contractor, or in buying and selling horses, cattle, or produce, under the suggestion that the road would be subservient to these purposes.

Let the demurrer be overruled.

Per Curiam.

Decree accordingly.

A corporation has implied power to use the means to carry out the objects of its creation. *Barcello v. Hapgood*, 118—p. 729.

See *Womack on Corp.*, p. 52 *et seq.*; *Clark on Corp.*, p. 120 *et seq.*; *Revisal*, 1128, 1129.

3. Manner and form of contract.

(96) DUKE v. MARKHAM,

105 N. C., 131, 10 S. E., 1017, 18 A. S. R., 889—1890.

CLARK, J. This was a claim and delivery proceeding brought against defendant, who as sheriff of Durham County had taken possession of certain personal property of a corporation, the Durham Sash, Door and Blind Manufacturing Company, by virtue of executions in his hands, and had advertised the same for sale. The plaintiff claims the property by virtue of the mortgage of November 15, 1888, given to indemnify him against loss as surety to said company upon a note to the bank, which would fall due November 15, 1889. The conclusion of the mortgage and the probate are in the following words: "In witness whereof the Durham Sash, Door and Blind Manufacturing Company sign by the names of president, secretary, and treasurer and two stockholders, and attest their seals. W. F. Remington, President; L. W. Grissom, Secretary and Treasurer; W. A. Wilkerson, Stockholder; Walter Wilkerson, Stockholder. Witness: Geo. W. Watts.—North Carolina, Durham County. The execution of the foregoing instrument was this day acknowledged on the part of L. W. Grissom and proven on the oath and examination of L. W. Grissom as to W. F. Remington, W. A. Wilkerson, and Walter Wilkerson. Let the same, with this certificate, be registered. This November 15th, 1888. D. C. Mangum, C. S. C."

We think His Honor erred in admitting the mortgage in evidence upon such probate, and likewise in instructing the jury, upon the proof offered by plaintiff, that it was valid as to creditors whom defendant represented by virtue of the executions in his hands. In *Pierce v. Building Co.*, 9 La., 397, it is held that the act of a majority of the stockholders, expressed elsewhere than at a meeting of stockholders, as where the assent of each one is given separately and at different times, is not binding on the corporation. The same is true of a meeting of which notice is not given. *Stow v. Wyse*, 18 Amer. Dec., 99, and notes; *Cook Stocks*, sec. 594; 1 *Potter Corp.*, sec. 336, and notes. In *Leggett v. Banking Co.*, 1 N. J. Eq., 541, it is held that a corporation is only bound by an agent's acts when within the scope of his authority, and that a president and cashier, as such, can not execute a mortgage of corporate property without special authority from the board of directors or the stockholders; and that the proceeds of a mortgage have been applied to the use of the corporation, in paying its debts or otherwise, is not sufficient to render the mortgage binding, if its execution was not properly authorized. "The members of a cor-

poration aggregate can not separately and individually give their consent in such a manner as to oblige themselves as a collective body, for in such case it is not the body that acts; and this is no less the doctrine of the common, than of the Roman civil, law. 'Being lawfully assembled,' says Ayliffe, 'they represent but one person, and may consequently make contracts, and, by their collective assent, oblige themselves thereunto.' And, though all the members of a corporation covenanted on behalf of it under their private seals," this, it was held, would only bind them personally, and not the corporation. Ang. & A. Corp., sec. 232, which is supported by the numerous cases there cited. Again, in the same work (sec. 504): "The separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers." Indeed, the authorities on this subject are numerous, uncontradicted, and supported by reason. It is true the common seal is *prima facie* evidence that a deed or contract is the act of the company, and that the seal has been affixed by authority, though it is competent to go behind the seal, and show that it was not affixed by the legally exercised authority of the company. In this case there was no common seal of the company attached. While a seal is not essential to the validity of a chattel mortgage, in the absence of the company's seal there is no presumption of its being the corporation's act, and it devolves upon the party relying upon the mortgage to show that the agent or officer had authority to execute it. The plaintiff's witness testifies that there was no resolution of stockholders or directors to authorize the mortgage, and no record to that effect is entered on the books of the company; that he went around privately and saw a majority of the stockholders, and they authorized him to execute the mortgage; and that he requested the president and two directors to sign it. A corporation can act only in the manner authorized by law. If by the meeting of stockholders (or of the directors if they have by the charter the right) the secretary of the company had been authorized to execute this mortgage or mortgages generally, the mortgage might have been valid; but, as we have seen, no authority can be derived in this irregular manner by an officer going around privately to what he alleges was a majority of the stockholders, and getting their consent. There is nothing to show that they were a majority, and that they did consent, as would be the case if a meeting were regularly held, the vote taken, and a minute entered on the company's records. To give validity to such proceedings would put it in the power of one man to wreck any company, and would lead to irremediable evils and abuses. The corporation seal not being attached, it was incumbent on the plain-

tiff to look to the authority of the agent with whom he dealt. Since it was not in the scope of the secretary's authority, as such, to execute the mortgage, and as no legal authority to execute the same specially was given, it goes for naught. The receipt and use of the money is not of itself, as we have seen, a sufficient ratification by the corporation. But it is immaterial here whether there was a subsequent ratification or not. Ratification would be good between the corporation and the mortgagee, but would not validate as to other creditors, a mortgage which was invalid when registered.

The mortgage is not good at common law for want of authority to the secretary to execute it, nor is it good as a statutory mortgage, under The Code, sec. 685, for there is no common seal attached, as required by that section; and the probate shows that, as to the president and the two stockholders, there was no legal proof of its execution by them. They neither acknowledged the same, nor was it proven by the examination of the subscribing witness, indeed, under the words of the statute (*Ib.*, sec. 685), it may be more than one witness is necessary, as required by The Code, sec. 1246, subd. 1. In *Todd v. Outlaw*, 79 N. C., 237, *Bynum, J.*, says: "Until a deed is proved in the manner prescribed by the statute, the public register has no authority to put it on his book. The probate is his warrant, and his only warrant, for doing so. *Williams v. Griffin*, 49 N. C., 31; *Burnett v. Thompson*, 48 N. C., 113; *Lambert v. Lambert*, 33 N. C., 162; *Carrier v. Hampton*, 33 N. C., 307. Not having been duly proved, the registration was ineffectual to pass the title, as against creditors or purchasers. *Robinson v. Willoughby*, 70 N. C., 358; *Fleming v. Burgin*, 37 N. C., 584; *DeCourcy v. Barr*, 45 N. C., 181." To same effect is *Evans v. Etheridge*, 99 N. C., 43, 5 S. E. R., 386. Error.

Where all the stockholders and directors, being the same persons, meet and agree to execute a mortgage, and the mortgage is executed under seal, it is a valid execution; the seal is not necessary except where it would be required for a natural person. *Benbow v. Cook*, 115—324; *Wade v. New Bern*, 77—460. A deed signed by a proper officer in the name of the company, with the seal attached, is a sufficient execution at common law, and the method required by statute is only additional. A corporation may convey by deed, sealed with the common seal and signed in its name by the president and two other members of the corporation and attested by a witness or witnesses; or by deed sealed with the common seal, signed by the president and attested by the secretary. *Revisal*, 1130. *Bason v. Mining Co.*, 90—417; *Lewis v. R. R.*, 95—179; *Shaffer v. Hahn*, 111—1; *Heath v. Cotton Mills*, 115—202; *Clarke v. Hodge*, 116—762; *Barcello v. Hapgood*, 118—p. 730. A mortgage executed according to the requirements of the statute, is the contract of the company and not of the officers signing it. *Bank v. Mfg. Co.*, 100—345. A company is bound by a contract made by its manager or superintendent within the general scope of the corporate business. *Clowe v. Pine Product Co.*, 114—304. Corporations other than railroads have a general power to mortgage their property unless prohibited by

the charter, and such mortgage executed under resolution of a majority of the stockholders, though not in regular meeting, is valid. *Paper Co. v. Chronicle*, 115—143. An agent with general power to manage the business can not make a contract that virtually disposes of all the property; neither can such contract be ratified except by a meeting of stockholders held according to law. *Bank v. Lumber Co.*, 116—827. Where the president of a bank signed blank certificates, and they were filled out by the cashier and used for his own benefit, the bank is bound. *Havens v. Bank*, 132—214. A contract made by an officer not previously authorized may become the contract of the company by ratification. *Greenleaf v. R. R.*, 91—33. A railroad company may be liable on contract for the services of special policeman. *Porter v. R. R.*, 97—46. A deed signed “C. M. Pres. of D. Mfg. Co.,” and sealed with his seal, and with one witness attesting, is the deed of the person and not that of the corporation. *Clayton v. Cagle*, 97—300; *Caldwell v. Mfg. Co.*, 121—339. But a corporation having no corporate seal may use as its seal the individual seals of its officers. *Taylor v. Heggie*, 83—244; *Edwards v. Supply Co.*, 150—171, 173; *Withrell v. Murphy*, 154—82; *Lockville Power Co. v. Carolina Power Co. (N. C.)*, 84 S. E., 398.

4. Ultra vires contracts.

(97) HUTCHINS v. BANK,

128 N. C., 72, 38 S. E., 252—1901.

CLARK, J. The defendant demurred on the ground that “being a National Bank, it had no power under the National Banking Act creating it to guaranty the debt sued upon.”

The Judge sustained the demurrer and dismissed the action. The plaintiff’s appeal presents only the correctness of that ruling for review.

The allegation in the complaint, which is admitted by the demurrer, is that the defendant, by letter, agreed that a draft drawn by plaintiff, not to exceed \$300, upon Chalkley & Co., for hides to be shipped them by plaintiff should be paid, and that in consideration of that guarantee the plaintiff shipped the hides to Chalkley & Co., but “defendant failed and refused to pay the draft as it had contracted and agreed to do, and the same was protested for nonpayment,” etc.

The National Banking Act contains no prohibition against such banks guaranteeing paper, but it is contended that the terms of the statute do not authorize a National Bank to make a contract of guarantee. In *Peoples Bank v. National Bank*, 101 U. S., 181, 183, it is said: “A guaranty is a less onerous and stringent contract than that created by endorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed that the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful

act of a third, he who gave the power to do the wrong must bear the burden of the consequences."

In *Railroad v. McCarthy*, 96 U. S., 258, 267, it is said, "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong," citing several cases. And in *Board of Agriculture v. R. R.*, 47 Ind., 407, "Although there may be a defect of power in the corporation to make a contract, yet, if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has, by its promise, induced a party relying on the promise, and in execution of the contract, to expend money and perform his part thereof, the corporation is liable on the contract." In *R. R. v. Trans. Co.*, 83 Pa. St., 160, "Where a corporation has entered into a contract which has been fully executed on the other part and nothing remains for it to do but to pay the consideration promised, it will not be allowed to set up the plea of *ultra vires*." To the same purport, 5 *Thomp. Corp.*, sec. 6024, and cases there cited.

"Even if a contract is *ultra vires*, yet if it is not illegal the defendant is estopped from setting up that defense, as it would be fraud on the plaintiff to allow this to be done, he having entered into the transaction relying upon said contract." *Bushnell v. Bank*, 17 N. Y., 378; *Whitney Arms Co. v. Barlow*, 63 N. Y., 62; *Waterman Corp.*, 604, and indeed the authorities and text-writers seem fairly uniform to this purport. The case strongly relied on to the contrary is *Bowen v. Bank*, 94 Fed. Rep., 925, but there the learned Judge stresses the fact that in that case the plaintiff (unlike the present) "had notice that there were no funds in the bank to meet the checks and that he knew that the contract was one of guaranty pure and simple." It may be doubted if the latter case could be sustained on review, but it is very different from this.

Here if it be conceded that the contract was *ultra vires* it was not expressly prohibited nor illegal, the plaintiff acted on it and relying on it he parted with his property and shipped the hides. The defendant is estopped on both reason and precedent to aver that it was not empowered to give the guaranty. It does not lie in defendant's mouth to say that it had no authority to do what it did, after the plaintiff has shipped his hides relying upon the defendant's promise that the draft should be paid.

In the preface of 4th Ed. of *Cook on Corporations*, it is well said: "The doctrine of *ultra vires* is disappearing. The old theory that a corporate act beyond the express and implicit corporate powers was illegal and not enforceable, no matter whether actual injury had been done or not, has given way to the practical view that the parties to a contract which has been wholly or partially

executed will not be allowed to say it was *ultra vires* of the corporation."

The judgment sustaining the demurrer is reversed.

If one party to the contract has performed his part, the other can not plead *ultra vires*. *Trustees v. Realty Co.*, 134—41. If a company acquires land for any purpose authorized by its charter, the purchase and sale by it is valid; if it transcends its powers in the charter, the purchase and sale are still valid against every one except the State. *Mallett v. Simpson*, 94—37. While a mining company buying "railroad supplies" might be acting *ultra vires*, it may be liable on such contract where the articles were purchased and used, and the seller had no notice that they were not to be used for the regular business of the company. *Luttrell v. Martin*, 112—593; *Herring v. Lumber Co.*, 159—382. A corporation not regularly organized, entering into a contract, is estopped to deny its existence, and so with the person dealing with it as a corporation. *Ryan v. Martin*, 91—464; *Perry v. Insurance Co.*, 139—374; but see *Wright v. R. R.*, 50—304. Where a foreign insurance company, not having taken out license, deals with a person in this State, it can not plead such failure to obtain license to defeat its liability on the contract. *Fisher v. Insurance Co.*, 136—p. 220; but the person so dealing with it may plead such defect of authority against his liability. *Insurance Co. v. Edwards*, 124—116; *Howard v. Ins. Co.*, 125—49. See *Revisal*, 1194, 4763, 4806, 4807; *Ober v. Katzenstein*, 160—439.

For *ultra vires* contracts generally, see *Womack on Corp.*, p. 73; *Clark on Corp.*, p. 163; 29 *Am. & Eng. Encyc.*, 42 *et seq.*; *Merchts. Bank v. Baird*, 160 *Fed.*, 642, 17 *L. R. A. (N. S.)*, 526; *Appleton v. Citizens Cent. Nat. Bank*, 190 *N. Y.*, 417, 83 *N. E.*, 470, 32 *L. R. A. (N. S.)*, 543.

Joint-stock associations, not incorporated, are only partnerships, and the members are liable as partners. *Bain v. Loan Association*, 112—248; *Haustein v. Johnson*, 112—253; *Faison v. Stewart*, 112—332; *Fertilizer Co. v. Clute*, 112—440.

Sec. 3. Aliens.

(98) BLACKWELL v. WILLARD,

65 *N. C.*, 555, 6 *A. R.*, 749—1871.

DICK, J. Every material allegation in the complaint, not controverted by the answer, shall for the purposes of the action, be taken as true. *C. C. P.*, sec. 137.

All the allegations in the complaint which are admitted in the answer, are considered as part of the answer in determining the matters in controversy.

In this case there is a demurrer to the answer, and we have to consider, whether the facts thus admitted, are sufficient to determine the rights of the parties.

Certain property belonging to the plaintiffs was sold under a decree of the court of equity for Beaufort County, made at Spring Term, 1860. The sale was made by John A. Stanly, Clerk and Master of said court; and the defendant, William H. Willard, became the purchaser of part of said property, and executed the four notes with the sureties as set forth in the pleadings. The sale was made on the 8th day of November, 1860, and the notes were pay-

able at 6, 12, 18, and 24 months from that date. The sale was duly confirmed by said court of equity, and the Master was directed to collect the purchase-money, when due, and hold the same subject to the order of the court.

At the Fall Term, 1861, the following order was made: "In this cause, it is ordered by the court, that the Master suspend the collection of the purchase-money, as long as in his opinion the same continues solvent, with authority to receive payment of such bonds as the makers thereof may desire to pay."

The first note was paid by the defendant, Willard, to John A. Stanly, Clerk and Master, on the 2d day of January, 1862, by a check on the Bank of Cape Fear; and the other notes were paid at subsequent periods in that year, in currency, which had not materially depreciated.

It is also admitted that said payments were made in good faith, and without any intention to defraud the plaintiffs.

The plaintiffs at the time of the sale of said property, and the collection of said notes, were citizens and residents of the State of New York; and said payments were received by the Clerk and Master, without their consent. The said suit in equity was pending at the commencement of the late war; and the plaintiffs, as citizens of the United States, were alien enemies, in the contemplation of the laws of the Confederate States.

One of the important consequences of a state of war is the absolute interruption of all commercial intercourse and dealing between the subjects of the two countries. A nonintercourse act was passed by Congress, on the 13th day of July, 1861 (12 U. S. Stat. at Large, 257), interdicting all commercial intercourse between citizens of the United States and citizens of the insurrectionary States.

The plaintiffs could not have commenced or prosecuted a suit in our courts, as then constituted, for their alienage could have been pleaded successfully in abatement of the action. 1 Saunders Pl., 86. Contracts existing prior to the war were not extinguished; but the remedy only was suspended; and this from the inability of a citizen of the United States to sue in the courts of an insurrectionary State, or to sustain a *persona standi in judicio*. 4 Bouv. Inst., 291.

The plaintiff's said suit in equity was pending at the commencement of the war; and thereupon their rights of action to collect or secure their debts became suspended. As they could not assert their rights in the court, they ought not to be prejudiced by the acts of adverse parties, or the officers of the court. The suit might have been abated, upon the plea of alienage put in by the defendants; but their rights of property and the right of action would

not thereby have been extinguished and defeated. Among the civilized nations of the present day, the principle is well established, and generally observed, that war ought not to interfere with the property of the private citizen of an enemy's country, unless upon urgent necessity; and they ought not to be deprived of any securities which they hold for their debts, which might be available upon a return of peace. Public policy requires nonintercourse laws to be enacted and strictly observed; but laws confiscating the property of the private citizens of an enemy's country are justly odious. These humane and enlightened principles are fully recognized by the courts of this country and founded upon the common law, and the modern laws of nations. 1 Kent, 63.

The relations between the plaintiffs and their counsel, in said suit in equity, were terminated by the war; and the steps afterwards taken in the cause did not affect them. They had a good claim against the defendants before the war began; their remedy was only suspended, and was revived upon the return of peace. *Ex parte Brass Maker*, 14 Vesey, 71; *Bell v. Chapman*, 10 Johnson, 183; *Bradwell v. Weeks*, 13 Johnson, 1.

We are of opinion that the order made in the court of equity, for Beaufort County, at Fall Term, 1861, and the payment received by the Clerk and Master during the war, from the defendant, Willard, constitute no bar to the claims of the plaintiffs in the present action.

There is no error in the ruling of His Honor; the demurrer is sustained, and the judgment in the court below is affirmed.

Per Curiam.

Judgment affirmed.

Debts contracted with an alien are not extinguished by war. *Hamilton v. Eaton*, 1—84, discussing the English treaty. The statute of limitations is suspended during war. *Clark's Code*, sec. 165; *Revisal*, 379.

Alien enemy.—Payment of a note for money due to an alien enemy, made to a Confederate receiver, does not cancel the debt. *Justice v. Hamilton*, 67—111; *Wood v. Branch*, 62—71; but a judgment in favor of a resident agent of such alien, satisfied by execution, is a bar to further action. *Elliott v. Higgins*, 83—459. No one can appoint an agent in a foreign country during war, and war revokes the agency between citizens of the two countries, except as to preexisting contracts. 2 Page Cont., sec. 962; *Hubbard v. Matthews*, 13 Am. Rep., 562; *U. S. v. Grossmeyer*, 9 Wall. (U. S.), 72. *Mut. Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L., 444, 18 A. R., 741; an alien enemy can not sue, but may be sued. *McVeigh v. U. S.*, 11 Wall., 27; 6 R. C. L., 714.

Alien friend.—Under the old law an alien could take a legacy of personality but not a devise of realty. *Atkins v. Kron*, 37—58. An alien friend could not take by descent. *Paul v. Ward*, 15—247; *Harman v. Ferrall*, 64—474. An alien had capacity to take land by purchase, and his title was good until divested by the State. *University v. Miller*, 14—188; *Rauche v. Williamson*, 25—141. *Revisal*, sec. 182, gives the right to an alien to take land by descent or purchase and make contracts in regard to the same. See also *Mordecai's Lectures*, p. 597 *et seq.*

Convicts.—The doctrine of *civiliter mortuus* does not exist in our law, and a person convicted and in prison may contract and be sued; and he

may also sue except so far as this right like others may be interfered with by his imprisonment. *White v. Underwood*, 125—25; 9 Cyc., 873 *et seq.* The statute of limitations is suspended during imprisonment. *Clark's Code*, sec. 148 (3). *Dade Coal Co. v. Haslett*, 83 Ga., 549, 10 S. E., 436; *Byers v. Sun Sav. Bank (Okla.)*, 139 Pac., 948, 52 L. R. A. (N. S.), 320.

Attorneys and physicians.—While these were formerly considered as exercising their professional skill for the honor in it, they have acted in this country generally upon the idea that "the laborer is worthy of his hire," and they may sue for compensation for their services. *Simmons v. Davenport*, 140—407, was a suit for attorneys' fees. In *Allison v. R. R.*, 129—p. 344; *Furches, C. J.*, says: "The law of this State, adopting the law of England as far back as 11 Hen. VII., did not allow an attorney 'to take any fee or reward' for his services in pauper suits. *Rev. Stat.*, chap. 31, sec. 153. *Rev. Code*, chap. 31, sec. 43, which continued to be the law until the adoption of The Code, as it was regarded as a species of champerty. But that is not the law now." And an attorney may make a contract for a contingent fee. *Rev. Code*, chap. 9, sec. 7, no attorney could take any greater tax fees in civil cases than those allowed by law, and these "tax fees" (*Rev. Code*, chap. 102, sec. 16,) were taxed as a part of the costs against the losing party.

Sec. 4. Infants.

1. Void contracts.

(99) SAWYER v. NORTHAN,

112 N. C., 261, 16 S. E., 1023—1893.

This was a civil action for the recovery of land. O. C. Farrar executed a deed to Thomas F. Credle, Jr., at the instance of Thomas F. Credle, Sr., the former being a minor; Thomas F. Credle, Sr., executed a mortgage on the land and gave notes for the purchase-money in his own name. Thomas F. Credle, Jr., died during infancy, and the plaintiff claims under deeds from his heirs, with notice of the facts. The defendant claims under a deed from Farrar and wife, reciting a sale under the mortgage above mentioned. The court adjudged that the plaintiff was entitled to recover the land upon the payment of the purchase-money which had been paid by the defendant. From this judgment both parties appealed.

CLARK, J. The transaction most favorable to the plaintiff, and leaving out of view all circumstances tending to prove fraud, is that Thomas F. Credle, intending to act as agent for his son, Thomas F. Credle, Jr., bought the land of O. C. Farrar with an agreement to mortgage the same for the purchase-money; that his son was a minor, twelve years of age, and hence incapable of appointing an agent; that the minority of the son was not made known to Farrar, who supposed, indeed, that he was conveying to Thomas F. Credle, from whom he had originally bought the land; that said Thomas F. Credle, after receiving the deed to which he caused the abbreviation "Jr." to be written after the name of

Thomas F. Credle, as the grantee named therein, did execute a mortgage on the land covered by the deed and mortgage notes for the full amount of the purchase-money, all of which he signed in his own name.

The jury find that the purchase and the mortgage back were contemporaneous acts and, of course, parts of the same transaction. The mortgage could have no validity because executed by one to whom the land had not been conveyed. But the deed was equally invalid and conveyed no title because it was merely a part of a transaction, which whole transaction was of no effect since Thomas F. Credle (assuming his good faith) had no authority, and could have none, to enter into such contract as agent for a minor.

It is true land can be conveyed to a minor, but when an alleged contract of purchase is made by a minor (whose infancy is undiscovered) under an agreement to mortgage the land back to secure the purchase-money, the whole transaction is a nullity since he can not execute the mortgage and there is no contract. One attempting to act as agent for him is in no better condition, for the minor could neither appoint an agent nor empower him to make a mortgage which he could not make himself. The conveyance is also a nullity, because the conveyance back by the grantee by way of mortgage which was a part of the contract, and the basis upon which it was made, was never executed. If the deed by Farrar had conveyed any title, there being a failure by the grantee to give a valid mortgage as agreed, Farrar retained the equitable title, or real title, since he could call for a conveyance.

In *Bunting v. Jones*, 78 N. C., 242, where there was a conveyance of land and a contemporaneous agreement for a mortgage back to secure the purchase-money, but the purchaser's wife refused to join in the mortgage, it was held that no title vested in the grantee, and his wife acquired no dower or homestead rights. In this case, as in that, it might well be said, "It was not intended to give the land to the party, and he has not given anything for it." That case has been cited and approved in *Moring v. Dickerson*, 85 N. C., 466, and *Burns v. McGregor*, 90 N. C., 222.

If here a valid mortgage back had been executed, the subsequent sale thereunder and the conveyance to the purchaser would have divested all rights of the plaintiff, who claims under the minor. As the mortgage was not executed as agreed, the contract was not carried out, what purports to be a deed to the minor conveyed no title, and the whole transaction was a nullity *ab initio*. No question of the rights of third parties can arise, as the plaintiff and all under whom he claims are fixed with knowledge of the facts. Certainly as between the parties, the title was not divested from O. C.

Farrar by such attempted conveyance; and if the subsequent conveyance from Farrar to the defendant has validity, it is because the title still remained in him, and not because he attempted to convey as mortgagee under a power of sale in an invalid mortgage.

The court should simply have given judgment against the plaintiff and in favor of the defendant for the land and for costs. This disposes of both appeals. The defendant will recover costs in both appeals in this court. Error.

In accord with the principal case, *Trueblood v. Trueblood*, 18 Ind., 195, 65 A. D., 756; *Burns v. Smith*, 29 Ind. App., 181, 64 N. E., 94, 94 A. S. R., 268; held voidable only, in *Patterson v. Lippincott*, 47 N. J. L., 457, 54 A. R., 178. By the weight of authority void contracts of infants seem to be limited to powers of attorney, appointment of agents, and arbitration agreements. 2 Page Cont., secs. 858-860; *Clark Cont.*, 154; but as to contract by agent see *Smith v. Kron*, 96—p. 397. In *Millsaps v. Estis*, 134—p. 491, it was held that an infant can not consent to a submission of his cause to arbitration, and any attempt to do so for him is absolutely void, but on a rehearing of the case in 137—535, it was held to be voidable only. According to the modern rule, all contracts of infants are voidable, except powers of attorney. 16 Am. & Eng. Encyc., 272. While an infant can not appoint an agent, he may act as agent or deputy in a ministerial office "unless very deficient in mental capacity." *R. R. v. Fisher*, 109—1. The tendency is to hold all contracts of infants voidable. *Craig v. Van Bebber*, 100 Mo., 584, 18 A. S. R., and note; 22 Cyc., 580.

Disability.—For the purpose of contract generally, the disability of infancy extends to the age of twenty-one; but the infant is of age on the day before his birthday. (1 Blk., 463; 16 L. R. A., 542.) Our law does not authorize a court to remove the disability of infancy. (*Clark Cont.*, 152.) Emancipation or marriage does not remove the disability to contract, though it may affect his right to his earnings and his liability for necessities. 2 Page Cont., sec. 852; 7 L. R. A., 176. As to when one becomes of age, see *Jackson v. Beard*, 162—105, 113; 22 Cyc., 511.

Common law rule.—1. If the court could see that it was prejudicial to the infant, the contract was void. 2. If beneficial, it was valid. 3. If doubtful, it was voidable. 2 Page Cont., sec. 855; 16 Am. & Eng. Encyc., 271. **Present rule.**—Certain contracts are valid, as (1) for necessities; (2) those authorized or required by law, as in bond for appearance, bond in bastardy proceeding, enlistment in the army, apprenticeship (*Revisal*, chap. 4), infant trustee. *Revisal*, 1036. In *Satterfield v. Reddick*, 43—p. 271, and *Freeman v. Cook*, 41—p. 378, it is said that a marriage settlement of her property made by an infant female was binding, because to her advantage. In *Musgrove v. Kornegay*, 52—p. 75, it is said that a deed executed by a child too young to be capable of understanding the nature of the contract is void; but if he has mental capacity, it is voidable. This seems to be the proper distinction. *Mord. Lect.*, 412. *Fonda v. Van Horne*, 15 Wend., 631, 30 A. D., 77; *Warwick v. Bruce*, 6 Taunt., 118, 6 E. R. C., 43; *Infants*, Cent. Dig., sec. 5; *Dec. Dig.*, sec. 5. "An infant is not absolutely incapable of binding himself by contract, but is generally incapable of absolutely binding himself." *Pollock Cont.*, 59.

2. Liability for necessities.

(100) JORDAN v. COFFIELD,

70 N. C., 110—1874.

SETTLE, J. The plaintiff, who is a merchant, furnished to the *feme* defendant certain articles just previous to her marriage, consisting of a chamber set and other articles constituting her bridal outfit, amounting in all to the value of \$104. It is conceded that the chamber set is still in the possession and use of the defendant. To the plea of infancy the plaintiff replies, necessities. His Honor charged that if the jury believed the articles furnished were actually necessary and of a reasonable price, the plaintiff was entitled to recover. . . . We see no objection to this charge.

In *Smith v. Young*, 19 N. C., 26, Daniel, Judge, states the rule governing such cases with great clearness. He says: "The question whether necessities or not is a mixed question of law and fact, and as such should be submitted by the Judge to the jury, together with his directions upon the law. Whether articles furnished to an infant are of the classes for which he is liable is a matter of law; whether they are actually necessary and of reasonable price is matter of fact for the jury." In addition to the authorities cited by the learned Judge in support of this proposition, we should add the recent case of *Ryder v. Wombwell*, decided in the Court of Exchequer and reported in *Law Reports*, 1868-69, page 31.

His Honor is to be understood as holding the articles furnished to be of the class for which the defendant would be liable, and it appears from the record that there was evidence, which was well left to the jury and from which they might have properly found that the articles were necessary to one in the degree and condition of the defendant, and that they were of reasonable price. There is an exception to the general rule that an infant is incapable of binding himself by a contract made, not in favor of tradesmen, but for the benefit of the infant himself, in order that he may obtain necessities on credit. As is well said in *Hyman v. Cain*, 48 N. C., 111, "Infants had better be held liable to pay for necessary food, clothing, etc., than for want of credit, to be left to starve." Nor are we to understand by the word necessities only such articles as are absolutely necessary to support life, but it includes also such articles as are suitable to the state, station and degree of life of the person to whom they are furnished. *Peters v. Flemming*, 6 M. & W., 46.

Although the point is not distinctly made upon the record, yet it would seem that the defendant relies somewhat upon the idea that

her mother was bound to support her, notwithstanding the fact that she had some estate of her own. The obligation of the mother is not the same as that of the father to support infant children, and the weight of authority, both in this country and in England, is against the liability of the mother to this burden, except under peculiar circumstances. 1 Parsons Cont., 308.

Judgment affirmed.

(101) FREEMAN v. BRIDGER,

49 N. C., 1, 67 A. D., 258—1856.

Action of *assumpsit*, in which defendant pleaded "general issue and infancy;" the plaintiff replied that the articles furnished were necessities.

The action was brought for the price of timber furnished to the defendant to build a house, and for other articles. The defendant was an infant at the time the articles were furnished, and lived with his mother. He had at that time a guardian, who took no control over him or his property. Before the articles were furnished the defendant had married, and the house, for which the timber was furnished, was for the residence of himself and family, and he was living in it at the time of the trial. Of the amount claimed \$14 was for necessities suitable to his condition, and the amount for the timber was \$55. The defendant had no other house and this one was suitable to his condition. There was a verdict and judgment for the plaintiff, and defendant appealed.

PEARSON, J. An infant is presumed not to have sufficient discretion to enable him to transact business and make contracts. So, the general rule is, that the contract of an infant is not binding on him. The exception is, that an infant is bound to pay for goods sold and delivered to him, provided they are necessary for his support. This is put on the ground that unless an infant can get credit for necessities "he may starve;" or as it is expressed in some of the cases, "an infant must live, as well as a man, therefore, the law gives a reasonable price to those who furnish him with necessities *ad victum et vestitum*, i. e., for victuals and clothes." Lord Coke says, Co. Lit., 172a, "It is agreed by all the books that an infant may bind himself to pay for his necessary meat, drink, apparel, physic and such *other* necessities." These last words embrace boarding; for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling and nursing (as well as physic) while sick. In regard to the quality of the clothes and the kind of food, etc., a restriction is added, that it must appear that the articles were suitable to the infant's degree and estate.

This is familiar learning, but in making the application it is proper to bear in mind the principle upon which the exception is made. His Honor was of opinion that a contract for fifty-five dollars worth of timber, for the purpose of building a house, made by the defendant while an infant living with his mother, fell within the exception, inasmuch as the timber was used for building a house on the infant's land "suitable to his estate and station in society," and "such as are usually occupied by prudent, economical young men just setting out in life with estates like the defendant's;" it also appearing that he had married, and was living in the house with his wife and child at the time of the trial.

We agree that if an infant marries, the principle of the exception extends to his wife and child. They are to be furnished with necessary food and clothing; for there is no more reason why they should "starve" than the infant himself; but in regard to the timber, and the necessity for building a house, we differ with His Honor.

The plaintiff's counsel was unable to cite any authority, or even a *dictum*, in support of His Honor's opinion, and it is manifestly against the reason of the thing. If the infant is bound to pay for the timber, he must pay for nails, glass, etc., and the wages of the workmen; in other words, for the whole house; and if this be so, on the ground that it is necessary for him to have a house to live in, it follows that he must pay for a horse, a wagon, a plough, etc.; because such things are necessary to enable him to cultivate his land; then would follow a few cattle and hogs; so, the result would be to make the exception broader than the general rule, and take from infants that protection which the law considers they stand in need of, by reason of their want of discretion.

There is another fact set forth in the case which makes the decision erroneous, not only in respect to the timber, but in respect to the fourteen dollars worth of articles admitted to be necessities, if the defendant's counsel had insisted upon the objection as to them: The defendant, at the time the articles were contracted for, *had a guardian*.

While an infant lives with a parent, he can not bind himself even for necessities, unless it be proved that the parent was unable or unwilling to furnish the child with such clothes, etc., as the parent considers necessary, "for no man shall take upon himself to dictate to a parent what clothing the child shall wear, and what time they shall be purchased, or of whom." *Bainbridge v. Pickering*, 2 Blackstone's Rep., 325.

"Guardians for infants are presumed to furnish all necessities, and a stranger who furnishes board, or anything else, must, except under peculiar circumstances, take care to contract with the guar-

dian." *State v. Cook*, 34 N. C., 67; *Hussey v. Rountree*, 44 N. C., 110; *Hyman v. Cain*, 48 N. C., 111; *Richardson v. Strong*, 35 N. C., 106; *Downey v. Bullock*, 42 N. C., 102. These cases settle the rule, that where there is a guardian, the replication "for necessities" does not avoid the plea of "infancy;" because the fact of there being a guardian, whose duty it is to furnish all necessities for the support of the ward, shows that it was not necessary for the infant to contract. To allow him to do so would defeat the provision which forbids guardians to exceed the income of their wards, and, in fact, would put the ward beyond the control of his guardian. It is stated in this case that the guardian assumed no control over the defendant. That does not prove that it was not his duty to do so. But if an infant may contract for timber, build houses, and stock his farm with horses, cattle, etc., it is idle to talk about the control of his guardian. The fate of this defendant (for we see from the record that this action was commenced against him by attachment, as an absconding debtor), proves the wisdom of the law and the need infants have of its protection.

Per Curiam.

Venire de novo.

As to what are necessities, and the province of the judge and jury, see *Mauldin v. So.*, etc., Univ., 126 Ga., 681, 55 S. E., 922, 8 Ann. Cas., 131, and *Nash v. Inman*, 2 K. B., 1, 14 Ann. Cas., 682. Where an infant had no property except his interest in an estate which appears to have been insolvent, money loaned to him by the administrator, to enable him to acquire a professional education, can not be recovered as for necessities. *Turner v. Gaither*, 83—357. Supplies furnished to an infant in the business of farming do not come under the head of necessities. *State v. Howard*, 88—650; *Grissom v. Beidleman*, 129 Pac., 853, 44 L. R. A. (N. S.), 411.

If the infant is living with the father, he is not liable for necessities; if not living with the father, but working for himself, he is liable, *Smith v. Young*, 19—26; *Hyman v. Cain*, 48—111; because it is the rule of law that the father shall support his children, if he is able, and if he is not able he should apply to the court for the use of their property. *Walker v. Crowder*, 37—p. 487; *Haglar v. McCombs*, 66—p. 351; *Mull v. Walker*, 100—46. A stepfather is not bound to support the wife's children by a former marriage; but a stepfather having been appointed guardian, can not charge his ward for support before his appointment: such child may become liable for such support by a promise after coming of age, *Barnes v. Ward*, 45—93; see also 44—110 and 100—46. A guardian is presumed to furnish all necessities. *State v. Cook*, 34—67; *Hussey v. Rountree*, 44—110. So a physician called to attend the slave of a ward, must look to the guardian for pay. *Fessenden v. Jones*, 52—14. But a guardian who is a merchant may furnish his ward necessities at a reasonable profit, *Moore v. Shields*, 69—50. See also as to liability for necessities, 5 L. R. A., 176; 12 L. R. A., 859; 60 L. R. A., 128; 16 Am. & Eng. Encyc., 275-281, and notes; 2 Page Cont., sec. 865; Clark Cont., 155; 1 Parsons Cont., 296; 22 Cyc., 590; Mordecai's Lectures, 414. The liability is *quasi* contractual, and applies only to the reasonable value and not to the contract price, *Hyman v. Cain*, 48—111; 1 Parsons Cont., 313.

In *Jordan v. Coffield*, 70—110, it is said that the liability of the mother to support the children is not the same as in case of the father; but this is questioned in 88—33.

3. Voidable contracts.

(102) SKINNER v. MAXWELL,

66 N. C., 45—1872.

DICK, J. The plaintiff purchased a stock of goods from the defendant for the purpose of carrying on the business of trade and merchandise. He paid a certain amount in cash and executed a note for the balance of the purchase-money which he secured by a mortgage on the stock of goods. After this purchase the plaintiff bought other goods, which in the course of his business were placed in the store with the stock which he had received from the defendant.

The day of redemption, specified in the mortgage, having passed without payment, the defendant, as mortgagee, took possession of all the goods in the store, and against the will of the plaintiff, was about to sell the same to satisfy the mortgage debt. This suit was commenced for the purpose of rescinding the contract of purchase and the mortgage, and an order for an injunction, and the appointment of a receiver was asked for to prevent the sale, and protect the property until the rights of the parties in this controversy are determined by the court.

The plaintiff alleges in his complaint that at the date of his contract with the defendant, he was an infant and still continues of nonage, and demands by way of relief, that said contract and mortgage be entirely rescinded, etc. This allegation of infancy is not denied in the answer, and is thereby admitted for the purposes of this action.

We will not consider the question of fraud mentioned in the complaint, or the merits of the controversy, as the plaintiff is entitled to a rescission of the contract on the ground of his infancy.

As a general rule the contract of an infant is not void, but voidable. Such a contract is incapable of being enforced at law by the adult party, if the infant chooses to plead his infancy. It is, however, capable of being ratified by the infant when he attains his majority.

Contracts entered into by infants for the purpose of trade and business are viewed with great suspicion by the courts, and have been frequently declared absolutely void. The courts are very watchful over the rights of an infant, who in contemplation of law is incapable of carrying on business and trade with proper discretion; and a contract made by him for this purpose, if it is manifestly prejudicial to his interests, will be set aside.

The principles which govern the contracts of infants are not distinctly defined and well settled in the books, but the better

opinion seems to be, that every contract of an infant is capable of being ratified, and is, therefore, only voidable.

When an infant is sued upon a contract, he can protect himself from a recovery by a plea of infancy; but he does not have to wait until he is sued in order to disaffirm his contracts.

Contracts which relate only to persons or personal property may be avoided by an infant during his minority by any act which clearly manifests such a purpose. 1 Parsons, 322.

The effect of such disaffirmance is to restore the property which remains to the person from whom it was obtained by the infant. It is held that an infant can not, during his minority, completely avoid a contract relating to land, but his disaffirmance only suspends the matter, and when he arrives at age, he is at liberty to revive and enforce such contract. 1 Parsons, 322, 8 Jones, 125.

In our case the infancy of the plaintiff being admitted in the pleadings, the prayer of the complaint, disaffirmed the contract of purchase and the mortgage, and the defendant became entitled to so much of the property in the store as belonged to the original stock, and the plaintiff was entitled to the goods afterwards purchased by him. The prayer for an order of injunction, and for a receiver was properly allowed by His Honor.

(103) FRANCIS v. FELMIT,

20 N. C., 637—1839.

This was an action of *assumpsit*. The defendant agreed to work for the plaintiff for three years at the carpenter's trade; the plaintiff was to teach him the trade, board him, furnish him with \$90 worth of clothing during the time, and at the end of the time give him a suit of clothes and a set of tools; the defendant worked two years and four months and quit; the plaintiff taught him the trade, boarded him, gave him \$114 worth of clothing and a set of tools, and now sues for breach of the contract and to recover the value of these articles; the defendant pleaded infancy. There was a judgment for the defendant, and the plaintiff appealed.

Affirmed.

DANIEL, J. The first count is founded on a breach of a special agreement, entered into by the defendant, to work and labor for the plaintiff for the term of three years, for the consideration therein expressed. We think that the plea of infancy was a good bar to any recovery on this count. Contracts entered into by a person within the age of twenty-one years are not binding unless they be for the supply of necessities, or unless he has confirmed them after he has attained that age. The second count is on a *quantum meruit* for necessities furnished to the infant defendant.

The plaintiff proved that he had furnished the defendant with necessities. The defendant, under the plea of nonassumpsit, was permitted by the court to give evidence that he was an able-bodied young man, and that he worked and labored for the plaintiff, and in that way paid for the necessities which had been furnished him. The Judge charged the jury that if they were satisfied that the defendant's services were equal to, or exceeded in value, the necessities furnished, they would find for him. We see no error in the admission of the evidence or in the charge of the Judge. Under nonassumpsit, evidence of payment in work and labor, or in any other thing which shows that the demand had been *ex equo et bono* extinguished before the commencement of the action is proper. The judgment must be affirmed.

(104) DRUDE v. CURTIS,

183 Mass., 317, 67 N. E., 317, 62 L. R. A., 755—1903.

HAMMOND, J. Both parties being infants at the time of the contract, either could avoid it without a return of the consideration. But neither could avoid it in part. He must avoid it wholly, if at all. And if the infant, when avoiding the contract, has in his hands any of the specific fruits, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same, and the other party may reclaim it. *Chandler v. Simmons*, 97 Mass., 514, 97 A. R., 117. The plaintiff, who was the buyer, sought first to exercise his right to avoid, and brought this action to recover the money; and, if the defendant also had not been an infant, he would have had no defense upon the count in contract, because the law would have implied a contract upon his part to refund the money. But the difficulty with the plaintiff's case is that the defendant is meeting the plaintiff with a weapon like that used by him, to wit, avoidance of a contract on the ground of infancy. And while the infancy of the plaintiff is a shield to him, it does not prevent the defendant from relying upon his own infancy in turn as a shield to him. So far as respects the right of defendant to take advantage of his own infancy, it is immaterial whether the plaintiff be an infant or an adult. Can the plaintiff recover in this action the money paid by him to the defendant? The defendant spent it before the plaintiff avoided the contract. His plea is a complete defense to the counts in contract. So the court ruled, and we do not understand that the correctness of this ruling is contested by the plaintiff. If at the time the plaintiff elected to avoid the contract the defendant had in his possession the same money which he received from the plaintiff, then since, by reason of the avoidance, the defendant had

no further right to hold it, the plaintiff perhaps might have maintained replevin, or, upon proper proceedings taken, have maintained trover as for a subsequent conversion. (The court then holds that trover would not lie if the money had been spent, because there was no tortious act.)

The generally accepted doctrine is that all contracts of infants are voidable at the option of the infant, while the other party is bound.

A being in debt sold a stock of goods to B, an infant, who promised to pay certain debts of A as the consideration. This was voidable as to B, but if made in good faith, the creditors of A could not set it aside for this reason. *Hislop v. Harris*, 68—141; *Tenn. Mfg. Co. v. James*, 91 *Tenn.*, 154, 18 *S. W.*, 262, 15 *L. R. A.*, 43 (contract for services). A person is liable for causing an infant to violate his contract. *State v. Harwood*, 104—724.

A bequeathed to B, an infant bound to him as apprentice, a horse, saddle and bridle, worth \$75; the executors refused to give the legacy, but finally compromised by giving B a cow and calf and a sow and pigs; B was not bound by the compromise, and could recover the legacy, but he would have to account for the property gotten. *Tipton v. Tipton*, 48—552.

Deeds.—An infant is presumed to assent to a deed made for his benefit, but he can repudiate it after coming of age. *Gaylord v. Respass*, 92—559. Where a deed was made by A to B, an infant, and delivered to C for B, a subsequent arrangement between A and C for C's benefit, and to destroy B's deed, would not affect B's title, as he was incapable of parting with the deed or assenting to its destruction. *Brindle v. Herren*, 88—383. Whether a deed of bargain and sale made by an infant is void or voidable was discussed by *Ruffin, C. J.*, in *Hoyle v. Stowe*, 19—320. Now considered voidable. *Mord. Lect.*, 665-667; *Baggett v. Johnson*, 160—26; *Boal v. Mix*, 17 *Wend.*, 119, 31 *A. D.*, 285.

Negotiable instrument.—This, like any other contract of an infant, is voidable. But "the endorsement or assignment of the instrument by a corporation, an infant, or married woman passes the property therein, notwithstanding that from want of capacity the corporation, infant, or married woman may incur no liability thereon." *Revisal*, 2180. The law before this was that such endorsement made a valid title as against the maker of the note, but the infant could still avoid it. Whether this changes the law has not been clearly decided. That it does not, see 4 *Am. & Eng. Encyc.*, 167, and note; 22 *Cyc.*, 588; 1 *Dan. Neg. Inst.*, sec. 227. *Bunker on Neg. Inst. Law*, p. 6, and note, *contra*.

As to liability on negotiable instruments generally, see 4 *Am. & Eng. Encyc.*, 165-167; 16 *Am. & Eng. Encyc.*, 284; *Armfield v. Tate*, 29—258.

Judgment.—The manner in which actions may be brought by and against infants is regulated by statute, *Clark's Code*, secs. 180, 181; but when an infant sues in his own name, without guardian or next friend, the judgment is voidable by him. *Tate v. Mott*, 96—19. When an infant sues by guardian or next friend for services rendered, he is bound by the judgment; if he sues alone, the defendant may object by plea in abatement for nonage; if objection is not taken in apt time, it is waived. *Hicks v. Beam*, 112—642.

4. Ratification and avoidance.

(105) WARD v. ANDERSON,

111 N. C., 115, 15 S. E., 933—1892.

Edward Anderson and wife, Letitia, and Matilda A. Sexton, a minor, executed two notes to John Beavans, one for \$150, and one for \$50, and secured the same by two mortgages on the land of the minor. Afterwards they executed a mortgage on the same land to Spencer Ward to secure a debt of \$400. The last mortgage contained the recital, "which said tract is subject to a prior lien in favor of John Beavans for \$200," and was executed after Matilda Sexton was of age. The court held that this was a ratification, and defendants appealed.

AVERY, J. The question presented by this appeal is whether the mortgage deeds executed by an infant, and purporting to convey land to John Beavans to secure two notes, one for \$150, and the other for \$50, were ratified by a recital in reference to the same land in a second conveyance of it to secure debts made after his arrival at the age of twenty-one, and in the following words inserted immediately after the description, to wit, "Which said tract is subject to a prior lien in favor of John Beavans, for the sum of \$200," it being admitted that no other mortgage deeds were ever executed by the infant to said Beavans.

In *McCormic v. Leggett*, 38 N. C., 427, Chief Justice *Pearson* stated the rule governing the ratification of the voidable contracts of infants after attaining their majority to be "that the deed of an infant is not void, but is voidable by him after he arrives at age. That in order to avoid the deed mere words are not sufficient, but there must be some deliberate act done, by which he takes benefit under the deed or expressly recognizes its validity." In *Hoyle v. Stowe*, 19 N. C., 320, cited in *McCormic v. Leggett*, *supra*, Chief Justice *Ruffin*, after doubting *Houser v. Reynolds*, 2 N. C., 143, stated the rule in reference to verbal declarations, relied on as a ratification of an infant's contract, to be that they operate as a confirmation of the deed only where they "are directly between the parties to the deed and contain an explicit recognition of the deed and expression of the maker's satisfaction with it, as a conveyance." If the ratification is in words it must amount to an express promise, made to the party to be benefited by it, or "an unequivocal act from which the inference is certain that a legal liability was meant to be acknowledged." *Ibid.*, p. 328. But an infant can disavow his voidable deed after arriving at full age, without directly treating with the grantee, either verbally or in

writing, by executing a deed for the same land to a stranger. *Hoyle v. Stowe*, *supra*. It was held by the court of New York that a second conveyance after an infant attained his majority, was such a solemn act that even though the bargainor was out of possession, and it was therefore inoperative to pass the land, yet, being equally as notorious as the first conveyance and inconsistent with the recognition of its validity, it was "an effectual avoidance of" the first deed. *Jackson v. Burchin*, 14 Johns., 124; *Jackson v. Carpenter*, 11 Johns., 539.

In our case *Beavans* relies not on a verbal promise, but upon a solemn deed, which though executed to a stranger, contained the most explicit acknowledgment, deliberately made, that the former conveyances had created a lien, still subsisting and superior to that created by the mortgage deed to *Ward*.

In the later case of *Turner v. Gaither*, 83 N. C., 362, Chief Justice *Smith* quoted the language of *Greenleaf* (2 vol., sec. 367), in which a distinction is drawn between executed and executory contracts.

We have in America two lines of authorities, the one holding that the infant's contract imposes no liability on him until created by a new ratification, having all the elements of a new contract, except a new consideration; the rule being that there must be either "an express promise, or such acts, after the infant becomes of age, as practically lead to the conclusion that he intended to ratify the contract." The other theory is that the infant, on attaining his majority, may ratify the contract "upon the same principles, for the same reasons, and by the same means, as a debt barred by the statute of limitations may be revived." 10 Am. & Eng. Enc., 645. This court may be classified as one of those that demands unequivocal evidence of an intention to ratify the voidable act, but the distinction is clearly recognized that mere words relied upon as a confirmation must have all the elements of a new contract between the parties, while a solemn and notorious act, such as executing a deed that contains a recital inconsistent with the disaffirmance of the voidable conveyance, or a new deed aliening the land to another, may operate as a ratification or repudiation, though the grantee in both cases is a stranger, and the grantee in the original deed, made during infancy, is not present nor a party to the subsequent deed.

We find in support of our view that the Supreme Court of Massachusetts, at a very early period of its history, held that a subsequent deed of a grantor made after arriving at his majority for the whole of a piece of land, recognizing by a recital a former conveyance for a part of the same land executed during infancy and conveying subject to it, ratified his former deed and made it

effectual in law to pass the land purporting to be conveyed by it. *Bank v. Chamberlain*, 15 Mass., 220. Other courts of this country have approved the principle laid down in that case. *Scott v. Buchanan*, 11 Humph. (Tenn.), 468; *Palmer v. Miller*, 25 Barb., 399; *Irvine v. Irvine*, 9 Wall., 617; *Linde v. Budd*, 2 Paige, 191. Precisely the same question, however, has been passed upon by some other courts, and they have followed the rule stated in *Bank v. Chamberlain*, *supra*; *Losey v. Bond*, 95 Ind., 67.

There is a striking analogy between the case at bar and that of *Hinton v. Leigh*, 102 N. C., 28, in which it was held that a similar recital in a mortgage deed of a lien created by a deed of trust executed previously but admitted to registration after the deed of later date, created a charge upon the land mentioned in the recital for the payment of the debt intended to be secured by the first mortgage, which the courts would enforce by ordering a sale, unless the debt should be discharged by a certain day. The judgment of the court below in our case declares the lien created by the ratification of the deed executed during infancy, and a sale is ordered on default in the payment of the debt due to the defendant, Beavans, before the day mentioned.

For the reasons given, we think that in holding that the mortgage deed executed during infancy was made effectual by the subsequent recital as far as to create a charge superior to the lien of the second conveyance, there was

No error.

(106) *PIPPEN v. MUT. BEN. L. INS. CO.*,

130 N. C., 23, 40 S. E., 822, 57 L. R. A., 505—1902.

This was an action to recover \$1,000 upon an insurance contract. The plaintiff's intestate, being under age, took out a life insurance policy, and afterwards surrendered it to the company for the sum of \$54, and died before coming of age. There was a judgment for the defendant, and plaintiff appealed. Affirmed.

COOK, J. . . . The good faith and fairness of these transactions with the infant intestate is not questioned; and it is expressly stated in the case agreed that "the said surrender was voluntarily made and executed in writing by the said intestate *bona fide* and without compulsion or undue influence on the part of the defendant." The main contention of the plaintiff is that the surrender of the policy by his infant intestate was a voidable contract, which he, in this action, seeks to avoid, and sues to recover upon the original contract of insurance which he endeavors to affirm. His Honor, upon the facts agreed, rendered judgment in favor of the

defendant, and plaintiff appealed. We sustain His Honor, and hold that the plaintiff is not entitled to recover.

The contract of insurance made with the infant, plaintiff's intestate, was not for necessities, and was therefore voidable at his election, but binding upon the defendant company. It was an executory contract (Lovell v. Ins. Co., 111 U. S., 264), relating to personalty; (Coningland v. Smith, 79 N. C., 303; Simmons v. Biggs, 99 N. C. 236; Hooker v. Sugg, 102 N. C., 115, 3 L. R. A., 217, 11 A. S. R., 717), and could therefore be avoided by him during his infancy. State v. Howard, 88 N. C., 650; Clark Cont., 244. His disaffirmance could have been made either by refusing to perform his part of the contract, and then pleading his disability in a suit for its enforcement; or by a voluntary annulment or cancellation made by agreement with the company. And it appears that he adopted the latter course by a voluntary surrender of the policy and receiving its cash value.

But it was argued by the learned counsel for the plaintiff that the intestate did not receive the full amount to which he was entitled by reason of the terms expressed in a "note" or condition appearing on the policy. Be that as it may, the disaffirmance of the contract by voluntarily surrendering it rendered the contract void *ab initio*, and the intestate then became entitled to be restored to his original status, which is not the subject of this controversy.

It is further insisted by the plaintiff that the surrender or delivering up of the policy, in consideration of the sum paid to him by the company, was a sale of the policy made by his intestate to the company, and in this action he, having affirmed the contract of insurance, disaffirms the sale, and is therefore entitled to recover upon the policy, although it had been delivered to the company. This contention can not be sustained, because the property, or interest, so vesting in the intestate, was a contingency liable to be defeated and incapable of delivery, actual or constructive, and therefore not the subject of sale; or, should it be considered an assignment, the instant the interest of the intestate passed out of him into the company, *eo instanti* the obligations therein imposed ceased and the contract was rescinded.

In the case of Edgerton v. Wolf, 6 Gray, 453, the defendant, an infant, purchased a horse, which was delivered to him, with the right to return the horse if he could not get the money to pay for him, and, after failing to get the money, returned the horse to the vendor plaintiff; but afterwards took the horse from the plaintiff's possession and sold him. The court there held that the sale made to the infant was voidable at his election, and his returning the horse voluntarily, intending to give up all his interest in the property, was an avoidance of the contract, and all the rights of the

vendor revested in him, and the infant defendant ceased to have any right over the property, and could not retake the same against the will of the vendor plaintiff.

So, it appearing that the surrender of the policy was a disaffirmance of the original contract of insurance, rendering the same absolutely void *ab initio* (Clark Cont., 258), a "disaffirmance can not be retracted. Ratification of a contract, after it has been once disaffirmed, comes too late. . . . When the infant has exercised the privilege to rescind his contract, he can not afterwards abandon or repudiate the rescission and take the other alternative." "The contract having been made void, can not be revived, except by mutual consent," says the court in *McCarty v. Iron Co.*, 92 Ala., 463, 12 L. R. A., 136. There is no error, and the judgment of the court below must be affirmed.

Contracts relating to personalty may be disaffirmed during infancy, *State v. Howard*, 88—650; *Stoll v. Hawks*, 179 Mich., 51, 146 N. W., 229, 51 L. R. A. (N. S.), 28; but contracts as to realty can not be disaffirmed or ratified during infancy. *McCormic v. Leggett*, 53—425; *Tillery v. Land Co.*, 136—537. Disaffirmance must be within a reasonable time after coming of age, which is held to be three years. *Weeks v. Wilkins*, 134—516; *Baggett v. Jackson*, 160—26.

Who may avoid.—Only the infant or his privies in blood can take advantage of his disability; but after he has avoided a deed, any one may disaffirm it. *Hoyle v. Stowe*, 19—320; *Mord. Lect.*, 667.

What amounts to ratification or disaffirmance.—There is a difference between executed and executory contracts. In the former any act amounting to an acknowledgment of liability will operate as a ratification; while in the latter there must not only be an acknowledgment of liability, but an express confirmation or new promise voluntarily made upon coming of age, and with the knowledge that he is not legally bound. *Turner v. Gaither*, 83—357; *Petty v. Rosseau*, 94—355; *Alexander v. Hutchinson*, 9—535, 12—13; *Mord. Lect.*, 668 *et seq.*; *Lanning v. Brown*, 84 Ohio St., 385, 95 N. E., 921, Ann. Cas., 1912 C, 772; *Bool v. Mix*, 17 Wend., 119, 31 A. D., 285.

"I shall have to pay, I suppose, but I shall do so at my convenience," is not a sufficient promise. *Dunlop v. Hales*, 47—381. "It is a just debt, and I'll pay it if I ever get so I can without inconvenience to myself," is insufficient. *Bresee v. Stanley*, 119—278. Where an infant gave his note for the purchase-money of land, and after coming of age remained in possession and promised to pay, it is a ratification. *Armfield v. Tate*, 29—258; *Dewey v. Burbank*, 77—259. A deed of an infant may be ratified or disaffirmed by act of the parties after coming of age, and perhaps by long and unreasonable acquiescence in the possession and enjoyment of the property. *Epps v. Flowers*, 101—158; *Cox v. McGowan*, 116—131. The receipt of the purchase-money after coming of age is a ratification, though advised by counsel that it would not be. *Norwood v. Lassiter*, 132—p. 55; *McCormic v. Leggett*, 53—425. When a guardian purchased a horse and buggy for his ward, who kept them after he came of age, sold them and used the money, it is a ratification. *Coffey v. McMichael*, 64—507. If a deed of bargain and sale by an infant is void, a second delivery after coming of age will make it valid; if voidable, a statement endorsed on the deed would ratify it. *Murray v. Shanklin*, 20—p. 435; and the execution of a deed to another would be a disaffirmance. *Hoyle v. Stowe*, 19—320. A judgment in a proceeding to which an infant is not a party is void as to him, and the receipt of money under it does not confirm it, but he may have to account for the money. *Stancill v. Gay*, 93—462. A

contract as to personalty may be disaffirmed by an infant during infancy or after coming of age by refusing to perform it, by pleading disability, or by dealing with the property as his own. *Pippen v. Ins. Co.*, 130—23; *State v. Howard*, 88—650.

Where an infant *feme covert* signed a deed but no probate was taken, signing again with her husband after coming of age is no ratification, and executing a new deed to another is a disaffirmance. *Gaskins v. Allen*, 137—426. Under the old law, Rev. Stat., chap. 37, sec. 9, when an infant *feme covert* acknowledged the execution of a deed and private examination was taken, it was conclusive. *Wright v. Player*, 72—94; *Woodbourne v. Gorrell*, 66—82; but not so under present law. *Jones v. Cohen*, 82—p. 78; *Epps v. Flowers*, 101—158; *Kidd v. Venable*, 111—535.

Where a guardian gave an option on his ward's land until April 23, signing by the ward on April 28, is not a ratification. *Leroy v. Jacobsky*, 134—459.

Marriage.—While this is a contract, it differs from other contracts in several respects, especially in that it can be entered into by a minor. The age for consent in males is 16, and in females 14 (Rev., 2082); entered into under that age it is voidable, and if the parties continue to live together after that age it is a confirmation. *State v. Parker*, 106—711; *Sims v. Sims*, 121—p. 300; *Koonce v. Wallace*, 52—194; *Mordecai's Lectures*, 210-213, 271; but an infant is not liable for breach of promise of marriage. *Mord. Lect.*, 176, 271, 412.

Effect of ratification or disaffirmance.—The infant has the right to ratify or repudiate his contract, but when he has made his election it is irrevocable. *Norwood v. Lassiter*, 132—p. 55; it is ratified or disaffirmed in *toto* and *ab initio*, and neither the infant nor his representative can retract. *Cox v. McGowan*, 116—131.

Return of consideration.—When an infant purchases property and has it in his possession after coming of age, and then repudiates the contract, he must restore it, and he is liable for a tortious use or disposition of it; but he is not liable for such disposition during infancy. *Devries v. Summit*, 86—p. 133; *Hodges v. Powell*, 96—p. 69. If he repudiates the contract and has the property, the other party is entitled to it or that into which it has been changed, if he can reach it; but the infant will not have to make it good if squandered during infancy. *Millsaps v. Estis*, 137—p. 546; *Mord. Lect.*, 413; 1 *Parsons Cont.*, 321; *Clark Cont.*, 171; *Englebert v. Pritchett*, 40 *Neb.* 195, 58 *N. W.*, 852, 26 *L. R. A.*, 177; *Lambkin v. Ledoux*, 101 *Me.*, 581, 64 *Atl.*, 1048, 8 *L. R. A. (N. S.)*, 104; *Craig v. Van Bebber*, 100 *Mo.*, 584, 18 *A. S. R.*, 569.

Misrepresenting his age does not estop the infant from taking advantage of his disability. *Loan Association v. Black*, 119—329; *Lowery v. Cate*, 108 *Tenn.*, 54, 6 *S. W.*, 1068, 91 *A. S. R.*, 744, 57 *L. R. A.*, 673; *Commander v. Brazile*, 88 *Miss.*, 668, 41 *So.*, 497, 9 *L. R. A. (N. S.)*, 1117; *Tobin v. Spann*, 85 *Ark.*, 556, 109 *S. W.*, 534, 16 *L. R. A. (N. S.)*, 672; *Putnal v. Walker*, 61 *Fla.*, 720, 55 *So.*, 844, 36 *L. R. A. (N. S.)*, 33; *Kirkham v. Wheeler-Osgood Co.*, 4 *Ann. Cas.*, 532, and note.

Tort in connection with contract.—While an infant is liable for his torts, he is not liable for torts growing out of contract, as for overdriving a horse which he has hired. *Barnes v. Herrin*, 44—p. 16; *Crump v. McKay*, 53—p. 34; nor where he repudiates the contract. *Poe v. Horne*, 44—398. The weight of authority in other courts seems to be that where he obtains the property for one purpose and uses it for a different purpose and thereby injures it, he is liable, as in hiring a horse to drive to one place and driving it to another place or beyond the distance intended. 16 *Am. & Eng. Encyc.*, 308, 309; 28 *Am. Rep.*, 518; 51 *Am. Rep.*, 340; 26 *L. R. A.*, 366; 57 *L. R. A.*, 673, and notes; but this doctrine does not seem to be accepted in North Carolina. See cases cited above, and *Mordecai's Lect.*, 417; *Rem.* 333. So an infant is not liable for a tort committed by his agent in a contract relation, but he may be liable for a tort by agent. *Kron v. Smith*, 96—p. 397.

Sec. 5. Insane persons.

1. Mental capacity determined.

(107) BALLEW v. CLARK,

24 N. C., 23—1841.

Action of ejectment. The plaintiff offered a writing purporting to be a deed for the land from M. Ballew, who is still alive, to the lessor of the plaintiff, and proved that the defendant held as tenant of Ballew. The question was whether at the time of making the deed Ballew was of sane mind. The court charged the jury that it was for them to decide whether Ballew knew what he was doing when he signed the deed; that if he had not mind sufficient to understand what he was doing, his act would be null and void; that if he was in his right mind at any time previous to the execution of the writing, this state was presumed to continue, and the burden would be on the defendant to show the contrary; but if he proved to the satisfaction of the jury that he was a lunatic before he executed the paper, the burden would be on the plaintiff to show that he had his mind at the time of its execution. There was a verdict and judgment for the defendant, and plaintiff appealed.

DANIEL, J. We are of opinion that the charge of the Judge was correct. The general rule is, that sanity is to be presumed until the contrary be proved; and where an act is sought to be avoided, on the ground of mental imbecility, the proof of the fact lies on the person who alleges it. On the other hand, if a general derangement be once established, or conceded, the presumption is shifted to the other side, and sanity is then to be shown at the time the act was done. 3 Kent., 451, 3 Bro., 441, 13 Ves., 88; Jackson v. Vanduson, 5 Johns., 144. The case states that the defendant was tenant of M. Ballew; and, we understand, that the lessee of the plaintiff contended that the law would not allow the said Ballew to stultify himself, or any other person to do it except his heir-at-law after his death. In 3 Kent, 451, it is said that the party himself may set up, as a defense and in avoidance of the contract, that he was *non compos mentis*, when it was alleged to have been made. The principle advanced by Littleton and Coke, that a man shall not be heard to stultify himself, has been properly exploded, as being manifestly absurd, and against natural justice. Yeates v. Bowen, Strange, 1104; Buller's N. P., 172; Webster v. Woodford, 3 Day's Rep., 90; Mitchell v. Kingman, 5 Pick., 431; Hill v. Peet, 15 Johns., 503. The Judge was right, we think,

in permitting the defendant to contest the validity of the deed, on the ground of insanity of the supposed bargainer. The judgment must be Affirmed.

(108) MORRIS v. OSBORNE,

104 N. C., 609, 10 S. E., 476—1889.

Civil action on a bond executed in 1867. To rebut the presumption of payment the plaintiff relied on an entry on the note, "January 26th, 1884. Renewed. T. A. Osborne." There was evidence tending to show that Osborne was mentally incapable of making such acknowledgment. There was a verdict and judgment for plaintiff, and defendant appealed.

AVERY, J. His Honor told the jury that if "Thomas A. Osborne had capacity to know what he was doing, and the consequences of his act, and that he signed the endorsement on the note, intending and meaning to signify and acknowledge that the debt had not been paid," they would find that the presumption of payment had been rebutted. A sane person is presumed, in law, to intend the natural and necessary consequences of his own acts. 8 Am. & Eng. Encyc., 753. It was conceded on the argument that it was not erroneous to instruct the jury, as a rule for testing mental capacity, that the person whose act is drawn in question must, in order to maintain the validity of it, be shown to know what he is doing, the consequences of his act, or that he must be capable in this case of understanding the meaning and import of the indorsement on the note signed by him. If Osborne knew what he was doing, and the consequences of his act, it would follow inevitably that he understood when he signed the endorsement, "January 26th, 1884. Renewed," that he was acknowledging that he had not paid the note, and that his obligation to pay was still subsisting; and, further, that, comprehending this, he must have meant or intended to signify that the debt had not been paid. This is but another method of defining the measure of mental capacity sufficient to qualify a person to make a valid contract. While it is not safe or advisable to attempt to frame formulas that are synonymous with rules repeatedly approved by the courts as criterions of capacity to contract, we see nothing erroneous, or calculated to mislead the jury, in the language objected to in this case, when considered in connection with the testimony and other portions of the charge. We do not intend to approve this direction as adapted to every case involving mental capacity to contract. The law does not demand that a person shall have unusual culture or capacity to qualify him to make a valid will, but that he shall know the "nature and character of the property disposed

of, who are the objects of his bounty, and how he is disposing of the property among the objects of his bounty." *Bost v. Bost*, 87 N. C., 477. It would not be erroneous, in speaking of a testator, to say that he must have intended or meant that one of his children should have certain stocks; another, bonds, and a third, land,—according to the provisions of the will, after his death. If he knew what he was doing, he knew that this would be the necessary result of making such a will, and he meant to signify his intent that such natural consequences should grow out of the act. So, when Thomas Osborne signed the endorsement, "Renewed January 26th, 1884,"—if he knew what he was doing, he did it to show or acknowledge that the debt evidenced by the note was still due and unpaid. The power to bind one's self by an agreement must not be made to depend upon the ability to foresee the remote consequences of the act; but a sane man must intend the natural, immediate, and inevitable results that follow and grow out of it. There is

No error.

In *Smith v. Smith*, 108—365, the same view was taken as in *Ballew v. Clark*, *supra*, but the action of the clerk in appointing a guardian *ad litem* was not a sufficient finding of insanity to rebut the presumption. Delirium tremens is only temporary insanity. *State v. Sewell*, 48—245. Insanity is not presumed until shown to exist. *Hudson v. Hudson*, 144—449.

Mere weakness of intellect is not sufficient to avoid a contract. *Lawrence v. Willis*, 75—471; that a person is deaf and dumb is not sufficient, though formerly he was considered an idiot. *Barnett v. Barnett*, 54—p. 222; *Christmas v. Mitchell*, 38—535; he must be able "to understand what he is about," but is not required to manage his affairs with judgment and discernment. *Moffitt v. Witherspoon*, 32—185; *Paine v. Roberts*, 82—451; *Barnhardt v. Smith*, 86—473; *Ducker v. Whitson*, 112—44; *Whitaker v. Hamilton*, 126—465; *Bond v. Mfg. Co.*, 140—381; neither weakness of mind nor old age, in the absence of fraud, is sufficient. *Smith v. Beatty*, 37—456; *Suttles v. Hay*, 41—124; *Williams v. Haid*, 118—481; *Jackson v. Rowell*, 87 Ala., 685, 6 So., 95, 4 L. R. A., 637; moral debasement is not necessarily insanity. *Mayo v. Jones*, 78—402; hereditary tendency is only a circumstance to show the existence of insanity. 51—471.

2. Effect of inquisition of lunacy.

(109) PARKER v. DAVIS,

53 N. C., 460—1862.

Action of *assumpsit*. The defendant pleaded specially that he had a guardian under a commission of lunacy. The plaintiff proposed to show that at the time the articles were furnished the defendant was of sound mind, and this evidence was admitted under objection. The defendant was a man of ordinary intelligence when sober, but was much addicted to drink, and the articles were furnished to himself and family. The court charged the jury that if they were satisfied the articles had been purchased by the defendant, or by his family with his knowledge and approval, when

he was sober, and had sufficient capacity to understand the nature of the transaction; that the account had been examined by him and admitted to be correct, when having sufficient capacity to understand, they should find for the plaintiff; otherwise, for the defendant. Verdict and judgment for the plaintiff, and defendant appealed.

BATTLE, J. We concur in the opinion expressed by His Honor in the court below. An inquisition of lunacy is not conclusive, and a person who deals with the supposed lunatic may show that at the time the contract was made he had sufficient capacity to make it. This was expressly decided by this court in the case of *Arrington v. Short*, 10 N. C., 71, and that decision has been confirmed by the subsequent cases of *Christmas v. Mitchell*, 38 N. C., 535, and *Rippy v. Gant*, 39 N. C., 443.

The counsel for the defendant has referred us to the Revised Code, ch. 57, sec. 1, which enacts that guardians of lunatics shall have like powers, and be subject to like remedies on their bonds, as guardians of orphans, and he contends that all contracts for articles or for services intended for the benefit of lunatics, like those for infants, ought to be made with their guardians, and that if made with the lunatics themselves, they are no more binding than such contracts would be if made with minors. *Fessenden v. Jones*, 52 N. C., 14. The analogy will not hold in cases like the present, because infants must necessarily remain such until they arrive at full age, when the guardianship of them terminates; but a lunatic may become of sound mind, and be capable of contracting for himself, and yet the guardianship may continue until another inquisition is found, by which he is declared to be of sound mind again. Besides, the provision in the Revised Code, to which reference has been made, was taken from the Act of 1784 (ch. 228, Revised Code of 1820), which was long before the decision, to which we have referred, was made. The finding of an inquisition and the appointment of a guardian, not being conclusive upon the plaintiff, the testimony offered by him to show the capacity at the time when the goods were purchased, was properly admitted, and as no valid objection can be urged against the charge made thereupon by the presiding Judge, the judgment must be

Affirmed.

The inquisition is not conclusive, is also held in *Armstrong v. Short*, 8—11; *Johnson v. Kincaid*, 37—470. Some courts hold that a contract by one who has been declared insane by a judicial inquisition is void and not voidable. 2 Page Cont., sec. 902; Clark Cont., 182; 19 L. R. A., 489; 51 L. R. A., 910; 68 L. R. A., 302; except as to necessities, 16 Am. & Eng. Encyc., 625. The question is referred to in *Odom v. Riddick*, 104—515, and *Sprinkle v. Wellborn*, 140—163, 3 L. R. A. (N. S.), 175, but not necessary to the decision.

A marriage by one who has been declared a lunatic is absolutely void

ab initio, and can be at any time so declared by the courts,—in a proceeding brought either in the name of the guardian or in the name of the lunatic by the guardian. *Sims v. Sims*, 121—297; *Johnson v. Kincaid*, 37—470; *Crump v. Morgan*, 38—91; *Setzer v. Setzer*, 97—252; *Lea v. Lea*, 104—603; *Williamson v. Williams*, 56—446; *Shaw v. Burney*, 36—148; *Webber v. Webber*, 79—p. 576. In *Smith v. Morehead*, 59—p. 363, the court says: "Want of reason makes the marriage absolutely void *ab initio*, and the pretended marriage may be so treated without any sentence pronounced by a court." If the marriage is void for want of mental capacity, no court nor legislature can make it valid. *Cooke v. Cooke*, 61—p. 588. In *Watters v. Watters*, 168—411, it is held that a marriage when one of the parties is insane, is voidable and not void, but may be declared void *ab initio* by a decree of court on behalf of the person *non compos*. The only void marriages are those prohibited by statute, Rev. 2083, between the races and for bigamy. As to suit for divorce for adultery, where the defendant becomes insane, see *Stratford v. Stratford*, 92—297; Mordecai's Lectures, 219-224. For method of proceeding in inquisition, see *Revisal*, 1890, and 132 N. C., 243. If no inquisition or guardian, the lunatic may sue by next friend. *Smith v. Smith*, 106—498; *Abbott v. Hancock*, 123—99; *Clark's Code*, secs. 180, 181.

3. Liability for necessities.

(110) RICHARDSON v. STRONG,

35 N. C., 106, 55 A. D., 430—1851.

Action of *assumpsit*. The defendant became insane, and so violent as to attempt to injure himself; the plaintiff attended him as a nurse and a guard, at the request of his son-in-law, and under the direction of a physician; upon defendant's recovery he refused to pay for the services, on the ground of his lunacy and that the services were not necessary. There was a verdict and judgment for the plaintiff, and defendant appealed.

RUFFIN, C. J. The contracts of a lunatic are not all absolutely void; but it is held that contracts fairly made with them for necessities or things suitable to their condition or habits of life are to be sustained. The leading case on the subject in England is that of *Baxter v. Earl of Portsmouth*, and in *Tally v. Tally*, 22 N. C., 385, the same opinion was expressed by this court. There is, therefore, no absurdity in the case of lunatics more than in that of infants in implying a request to one rendering necessary services or supplying necessary articles, and implying also a promise to pay for them. Indeed, with whatever propriety the ancient maxim that no one ought to be allowed to stultify himself is denied in modern law, its application in a case of this kind seems entirely just. The urgency of the case demands instant help, and leaves no opportunity for a previous application to a court having the ordering of the estates to fix an allowance; and in such an instance as this, in which, as far as is seen, there was a recovery before a commission issued, there could be no subsequent allowance, however assiduous and effective the attentions to the party

might have been. Therefore, there is no middle ground between leaving an unhappy person thus afflicted destitute of those services and things indispensable to his proper restraint and recovery, or however rich, dependent for them on gratuitous benevolence, on the one hand; or on the other of implying a promise to pay for them what they may reasonably be worth. It is as if a physician administered to a man deprived of his senses by a dangerous blow, when the loss of life might result from delay. He would certainly be bound to make reasonable remuneration, though incapable at the moment of making an actual request. The reason extends to medical services to a madman, and to those of a nurse for him, or of a guard to protect him from a propensity to destroy himself or his property. In the case before the court the plaintiff acted at the instance of the defendant's medical adviser and his nearest friend and relatives, not insisting, however disagreeable the duty, on any stipulation for high wages, but content with a *quantum meruit*. His conduct was, therefore, as fair as it could be.

Upon the other point there is no doubt. What the plaintiff did certainly falls within the class of necessities as defined in the law.

Judgment affirmed.

Contract of lunatics for necessities is binding, as in case of infants. *Tally v. Tally*, 22—385; and it applies also to support of wife and children, *Brooks v. Brooks*, 25—p. 391; it seems also to apply to necessary expense in protecting his property, not being limited strictly to personal expense, *Young v. Kennedy*, 95—265; and where money has been furnished for the supposed benefit of a lunatic, he is liable only for the part actually expended for necessities for the lunatic and family. *Surles v. Pipkin*, 69—513.

4. Contract voidable.

(111) RIGGAN v. GREEN,

80 N. C., 236, 30 A. R., 77—1879.

Civil action heard on exceptions to referee's report. The plaintiffs, as heirs-at-law of Joseph H. Riggan, sued to recover a tract of land, and defendant claims the land under a deed from said Riggan to one Brown. The plaintiffs reply that the deed was executed when Riggan was of unsound mind and incapable of making a deed; the defendant rejoins a purchase by Brown and himself for full value and without notice of any incapacity, and that the grantor and his family received the benefit of the purchase-money. The referee found against the plaintiffs, and His Honor overruled exceptions and confirmed the report, and plaintiffs appealed.

DILLARD, J. Under our present system the distinctive principles formerly applicable in the separate courts of law and equity

are now to be recognized in the Superior Courts, and such judgment and decree is to be pronounced, as the equitable rights of the parties may require. And in conformity to this idea, the order of reference in this case was drawn, giving the referee power to deal with the matters under investigation, as a chancellor under a bill to set aside the deed of a lunatic. Considered in this point of view, it becomes material to inquire what is the effect of a deed of a lunatic for land, and for what and under what circumstances will such a deed be set aside, and a recovery allowed of the property conveyed.

The doctrine as to the effect of a deed of a lunatic is thus laid down by Blackstone, 2 vol., p. 295: "Idiots and persons of non-sane memory, infants and persons under duress, are not totally disabled to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable and not actually void." In 2 Kent's Commentaries, 451, it is said, "that sanity is to be presumed until the contrary be proved, and therefore by the common law a deed made by a person *non compos mentis* is voidable only and not void." By our statute law, a deed executed and registered, passes a seisin, and by the decisions under said statute the registration of a deed of bargain and sale is equivalent to livery of seisin in a feoffment; Bat. Rev., ch. 35, sec. 1; Hogan v. Strayhorn, 65 N. C., 279; Hare v. Jernigan, 76 N. C., 471; and therefore we conclude that the deed of Joseph H. Riggan availed to pass an estate to James T. Brown, and the same was valid until by an action of the grantor or his heirs the same is avoided.

Such being the operation of the deed, and this action being brought in a court competent to recognize and administer the legal and equitable rights of the parties in the same suit, it remains to determine how the court ought to have dealt with the subject-matter involved therein.

Courts of equity ever watch with a jealous care every contract made with persons *non compos mentis*, and always interfere to set aside their contract, however solemn, in all cases of fraud, or when the contract or act is not seen to be just in itself, or for the benefit of such persons; but when a purchase is made in good faith, without knowledge of the incapacity, and no advantage is taken, for a full consideration, and that consideration goes manifestly to the benefit of the lunatic, courts of equity will not interfere therewith. 1 Story Eq., secs. 227, 228; 1 Chitty on Contracts, 191; Molton v. Camroux, 2 Exc., 487. If a court of equity in any case sets aside the deed of a *non compos*, it will ordinarily administer the equity of having him to pay back to the other party the money or other thing received of him. And when it appears that the consideration is full and the lunatic is not able to put the

other party in *statu quo*, or if the benefit received is actual and of a durable character, in either case, the courts of equity will not be inclined to set aside the conveyance. Carr v. Holliday, 21 N. C., 344; and same case, 40 N. C., 167.

Now in the light of these principles, what ought to have been the conclusions of law by the referee on the facts found and set forth in his report, and what should have been the judgment in the court below on the exceptions taken to the referee's conclusions of law? It is expressly found as a fact that the \$500 paid by Brown to Riggan was the full value of the 30 acres conveyed to him, and that the same went to extinguish an execution against the lunatic in the hands of an officer, and that by means thereof the said Joseph H. Riggan was enabled to keep and occupy, till his death, another piece of land designated as his homestead, which now by descent belongs to plaintiffs; that the deed to Brown was executed in the family of the grantor, and attested by a brother and two sons of the grantor, and that Brown and the defendant claiming under him, have ever since held and used the said land as their own, and made large improvements without objection or any interposition by the grantor or any other on his behalf, and it is further found as a fact that the purchase of defendants was for full value and without notice of any incapacity in Joseph H. Riggan. From such a state of facts it would be apparent to the chancellor, and he would so decide, that a rescission of the deed would produce no benefit to the plaintiffs if coupled with the duty and obligation to replace defendants in *statu quo*, whilst it would be a great inconvenience and injustice to the defendants, and thereupon the conclusion would be not to interfere to set aside the deed, but leave the same to be operative and valid. And it is therefore our opinion that the referee was correct in his conclusions of law, and no error was committed by the judge in the court below in overruling the plaintiff's exceptions. Affirmed.

The deed of an insane person is voidable and not void, and the courts interfere in such cases on the ground of fraud, Creekmore v. Baxter, 121—31; and will not usually set the deed aside unless there has been fraud, or knowledge of the insanity, and then will place the parties in *statu quo*. Odom v. Riddick, 104—515; Sprinkle v. Wellborn, 140—163, 3 L. R. A. (N. S.), 174; Godwin v. Parker, 152—672; Ipock v. R. R., 158—445; Smith v. Ryan, 191 N. Y., 452, 84 N. E., 402, 19 L. R. A. (N. S.), 461, 14 Ann. Cas., 505; Thompson v. Thomas, 163—500; Jackson v. King, 4 Cowen, 207, 15 A. D., 354; Moulton v. Cambroux, 4 Ex., ch. 17, 6 E. R. C. 71, 140 A. S. R., 346, and note; it seems that after inquisition the deed or contract is void, since knowledge is generally conclusively presumed. West v. R. R., 151—231; Flach v. Gottschalk Co., 88 Md., 368, 7 A. S. R., 418; Barkey v. Barkey, 106 N. E., 609, L. R. A., 1915 B, 678. A sheriff's deed is not void because the defendant in execution was insane at the time of the judgment and sale, it is voidable. Thomas v. Hunsucker, 108—720. Upon becoming insane the right of a sheriff to exercise his

office ceases, and the authority of his deputies terminates. *Somers v. Comrs.*, 123—582.

A purchaser without notice of insanity is protected; so also is a purchaser with notice from one not having notice, or a purchaser without notice from one with notice. *Odom v. Riddick*, 104—515, 7 L. R. A., 118, 17 A. S. R., 686.

The creditor must proceed in the Superior Court as a court of general equity jurisdiction to have his debt paid out of the residue of lunatic's property, after allowance made for his support. *Adams v. Thomas*, 81—296. The same case again before the court in 83—521; *Blake v. Respass*, 77—193; *Smith v. Pipkin*, 79—569; *Latham v. Wiswall*, 37—294; *McIlhenny v. Trust Co.*, 108—p. 313; *McLean v. Breese*, 109—564, 113—390.

As to contracts of insane persons generally, see 2 Page Cont., secs 894—901; *Clark Cont.*, 178; *Mordecai's Lectures*, 660; 16 Am. & Eng. Encyc., p. 562 *et seq.*; *Pollock Cont.*, 93; 22 Cyc., 1194; 6 R. C. L., 594.

Sec. 6. Drunken persons.

(112) CAMERON-BARKLEY CO v. LIGHT & POWER CO.,

138 N. C., 365, 50 S. E., 695, 107 A. S. R., 532—1905.

Civil action on contract. Judgment for defendant, and plaintiff appealed.

WALKER, J. This action was brought to recover damages for the breach of a contract whereby the plaintiff agreed to sell and the defendant to buy a Corliss engine. The case was heard at a former term (137—99) upon a petition for a *certiorari*. We ordered the writ to issue so that the plaintiff's exceptions and assignments of error could be more accurately stated. The judge who tried the case has made a very full and satisfactory return to the writ, and has given the plaintiff the benefit of every exception which could possibly be taken to the rulings of the court. The defect in the original case appears now to have occurred through no fault of the judge, who was exceedingly liberal and accommodating towards counsel, agreeing for their convenience to appoint a place in the district to settle the case.

The defendant in its answer admitted that its president had signed a contract and pleaded specially that at the time of signing it, he was so drunk that he did not have sufficient mental capacity to contract with the plaintiff for the engine. The court, without objection, submitted only one issue to the jury, which is as follows: "What damage, if any, is the plaintiff entitled to recover of the defendant?" The jury answered "nothing." Judgment was entered accordingly.

The question presented for our consideration arises upon an exception to the charge of the court regarding the drunkenness of the plaintiff's agent and its sufficiency to avoid the contract. It is held by some authorities to be a principle of the common law that every contract, which a man *non compos mentis* makes, is avoid-

able and yet shall not be avoided by himself because it is a maxim in law that no man of full age shall be, in any plea to be pleaded by himself, received by the law to stultify himself and to set up his own disability in avoidance of his acts. *Beverly's Case*, 4 Rep., 123. And Coke, as appears in his *Institutes*, was of the same opinion: "As for a drunkard who is *voluntarius daemon*, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." Co. Litt., 247a. But Blackstone observes that this doctrine sprung from loose authorities and he evidently agrees with Fitzherbert, who rejects the maxim as being contrary to reason. 2 Blk., 291. Whatever was the true principle of the common law as anciently understood, there can be no doubt that since the reign of Edward III, if not since the time of Edward I, it has been settled according to the dictates of good sense and common justice that a contract made by a person, so destitute of reason as not to know the nature and consequences of his contract though his incompetence be produced by intoxication, is void, and even though this condition was caused by his voluntary act and not procured through the circumvention of the other party. Mere imbecility of mind is not sufficient as a ground for violating the contract when there is not an essential privation of the reasoning faculties or an incapacity of understanding. 2 Kent, 451. This court has adopted Coke's definition that a person has sufficient mental capacity to make a contract if he knows what he is about. *Moffit v. Witherspoon*, 32 N. C., 185; *Paine v. Roberts*, 82 N. C., 451. And it has been held not error to charge that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its full extent and effect. *Cornelius v. Cornelius*, 52 N. C., 593. The doctrine that a party may plead his own disability to defeat the alleged contract arises out of the very nature of a contract, which requires that the minds of the parties should meet to a common intent, and if one of them has not "the agreeing mind" the contract can not be formed. In *Hawkins v. Bone*, 4 F. & F., 311, Chief Baron *Pollock* said: "But the law of England is that a man is not liable on a contract alleged to have been made by him in a state in which he was not really capable of contracting. A contract involves a mutual agreement of two minds, and if a man has no mind to agree, he can not make a valid contract;" and the question at last is whether he was wholly incapable of any reflection or deliberate act, so that in fact he was unconscious of the nature of the particular transaction. It is not necessary that he should be able to act wisely or discreetly, nor to effect a good bargain, but he must at least know what he is doing. So far as the legal incapacity is concerned, it can make no difference from what

cause it proceeded, whether from the party's own imprudence or misconduct, or otherwise. It is the state and condition of the mind itself that the law regards, and not the causes that produced it. If from any cause his reason has been dethroned, his disability to contract is complete. *Bliss v. R. R.*, 24 Vt., 424. The Master of the Rolls (Sir William Grant) in *Cook v. Clayworth*, 18 Vesey, 15, said: "As to that extreme state of intoxication that deprives a man of his reason I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition." Lord *Ellenborough* in *Pitt v. Smith*, 3 Camp., 33, thus states the doctrine: "You have alleged that there was an agreement between the parties, and this allegation you must prove, as it is put in issue by the plea of not guilty; but there was no agreement between the parties if the defendant was intoxicated in the manner supposed when he signed this paper. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise."

The authorities sustaining the view of the law we have stated and adopted are quite numerous. *Clark on Cont.* (2d Ed.), p. 186; *Parsons on Cont.* (9th Ed.), p. 444; *Matthews v. Baxter*, L. R. Exc., 132; *Webster v. Woodford*, 3 Day, 90; *Van Wyck v. Brasher*, 81 N. Y., 260; *Barsinger v. Bank*, 67 Wis., 75; *Rush v. Breinig*, 113 Pa. St., 310; *Bates v. Ball*, 72 Ill., 108; *Wright v. Fisher*, 65 Mich., 275; 14 Cyc., 1103; 17 A. & E. Enc. (2d Ed.), 399.

It was held in *King v. Bryant*, 3 N. C., 394, that if a man was so drunk at the time of signing a bond that he did not know what he was doing, and while in that condition he was induced to sign the instrument, it was a fraud upon him which vitiated the bond, even in an action at law upon it, and to the same effect is the decision of the court in *Gore v. Gibson*, 13 M. & W. (Exch.), 623—opinion of *Park, B.* In the latter case, *Pollock, C. B.*, said: "Although it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the weight of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice."

We have examined the charge of the court with care and can not find that His Honor said anything not in strict accordance with the law, as we now declare it to be. He charged the jury as follows: "The mere fact that the defendant's president was drinking was not sufficient, but the jury must find that he was so intox-

icated that he could not understand the nature and scope of what he was doing. If the jury find from the greater weight of the testimony that the agent was drinking, it would not be sufficient to invalidate the contract, but if the jury find that the defendant's president, at the time he signed the contract or order for the engine, was so drunk as to be incapable of knowing the effect of what he was doing, then the contract or order would not be binding upon the defendant. Whether or not he was so intoxicated as to render him incompetent to contract, is a question for the jury upon all the evidence." We think this was a clear and sufficient exposition of the law applicable to the facts of the case. What the judge said in his reference to the nature of the transaction in which the agent was engaged and its importance or magnitude, was not calculated in our opinion to confuse the jury or lead them away from the real question involved in the issue, but was evidently intended to point what he had already said as to the true test of mental capacity, and to impress upon them, as an essential condition of the validity of the contract, that the agent of the defendant at the time he signed the paper must have been sober enough to understand the nature of the transaction and the effect or consequence of his act, and not that he must have been able to act with wisdom or discretion. The particular transaction, and what the party did in respect to it, may have furnished some evidence of his mental condition. The effect of that part of the charge to which the plaintiff excepted was to leave the whole transaction, with the evidence as to the agent's intoxication to the jury, and in doing so no reversible error was committed. His Honor told the jury that they must find that the agent was so intoxicated that he did not understand the nature and scope of the transaction, and that this was a question for the jury upon all of the evidence, a part of which necessarily was the transaction itself, whether in its nature large or small. Even if the illustration, as argued, was not a very apt one, it did no harm that we can discover.

No error.

Intoxication as a defense to an action on contract. *Morris v. Clay*, 53—216. If a person intoxicated makes a bad trade, it may be ratified after he becomes sober, or it may be set aside for fraud and imposition. *Moore v. Reid*, 37—580; *Calloway v. Witherspoon*, 40—128. The question of drunkenness is generally considered under the head of fraud. *McLeod v. Bullard*, 84—515; *Freeman v. Dwiggin*, 55—102; *Futrell v. Futrell*, 59—337; *Reid v. Moore*, 25—310; *Hyman v. Moore*, 48—416; *Gregg v. Williams*, 12—46; 54 L. R. A., 440; *Mordecai's Lectures*, 662; *Burch v. Scott* (N. C.), 84 S. E., 1035; *Cook v. Bagnell Timber Co.*, 78 Ark., 47, 8 Ann. Cas., 254; *Miller v. Sterringer*, 66 S. E., 228, 25 L. R. A. (N. S.), 596; 6 R. C. L., 597; *Bish. Eq.*, sec. 230.

Sec. 7. Married women.

1. At common law.

(113) KNOX v. JORDAN,

58 N. C., 175—1859.

In 1853, Draper, Knox & Co., of New York, sold goods to defendant, W. B. Jordan, who gave a note with his wife as surety, as follows:

“New York, Sept. 22, 1853.—Six months after date I promise to pay to the order of Draper, Knox & Co. six hundred and thirty-five dollars and eighty-five cents at their office, value received. (Signed) W. B. Jordan and Mary J. Jordan.”

At the time of the execution of the note, Mary J. Jordan had considerable property to her separate use and benefit, but there was no trustee. She signed the note simply as surety and did not charge nor intend to charge it upon her separate estate. This was a bill in equity to subject her separate property to the payment of the debt.

MANLY, J. The case brings up again the inquiry how far and under what circumstances the separate estate of a married woman is liable for her engagements.

This subject has undergone much discussion and has been variously settled elsewhere; but in North Carolina it is still considered an unsettled question in many respects.

No case has yet gone to the extent of sanctioning the doctrine, that as to the separate property, the married woman is regarded as a *feme sole* in all respects. This seems to be the English doctrine followed in this country by New York, but not by any other State that we are aware of, while Pennsylvania, Virginia, South Carolina, Tennessee and Mississippi adopt a different rule. In the case of *Frazier v. Brownlow*, 38 N. C., 237, it has been decided by this court that a married woman may, in an obligation which she contracts, specifically charge the same on her separate property, where it is done with the concurrence of the trustee. And in the case of *Harris v. Harris*, 42 N. C., 111, it is decided, where slaves are bequeathed to the sole and separate use of a married woman during her life (no trustee being named) and then for the use of two daughters, and then over to their children, that a sale by the woman, in which her husband, the daughters and their husbands joined, was good. It was not necessary to this latter decision that a different principle should be resorted to than that on which the case of *Frazier v. Brownlow* rests. The sale by the parties might

have been upheld for the life of the wife as a charge upon the profits only; and in that way the two would have been consistent and stood upon ground which we think more compatible with the objects of such settlements and the rules of the common law. The principle of the case of *Frazier v. Brownlow* we adopt, because we are unwilling to take a step backward and to unsettle a matter which has been considered as settled so long and which has, we doubt not, been frequently followed. But we are at the same time unwilling to depart further from the principles of the common law in relation to the disabilities of married women and run into the labyrinth of difficulties which allows the doctrine whereby they are treated as *femes sole*. We prefer adhering as closely as may be, consistently with decided cases, to the rule that a separate estate for the support of a married woman does not confer any faculties upon her except those which are found in the deed of settlement and that, in all other respects, she is a *feme covert* and subject to the usual disabilities.

As we have said, however, we recognize, as settled law, the principle upon which the case of *Frazier v. Brownlow* stands, viz., that a wife may, when not restricted by the deed of settlement, with the concurrence of the trustee, specifically charge her separate estate with her contracts and engagements. She may encumber expressly, but not by implication.

At common law the legal existence of the wife was for most purposes merged in that of the husband; she could not, except in special cases, contract, nor sue, or be sued, nor make any contract in respect to her separate estate that would, in law, bind her. But courts of equity, as a consequence of the principle established by them, that a married woman may take and enjoy property to her separate use, enable her to deal with it in certain respects as a *feme sole*. She may alien or encumber it in execution of powers conferred on her by the terms of the trust, and if not restricted by the terms, may under the authority of *Frazier v. Brownlow* charge the income or profits with the payment of debts, or appropriate them to any selected object, provided such charge or appropriation be specific and unequivocal and concurred in as before stated.

She is not liable by reason of her separate property to her general personal engagements, by holding such engagements a charge by implication or by any similar rule of construction.

We are not sure this restricted view of the powers and liabilities of married women will adequately protect them from the peculiar influences which act upon them, but we are quite sure, the other, of regarding them as *femes sole* in respect to their sepa-

rate estate, would render such settlements in very many cases futile and vain.

It will be seen from what has been said that the creditors' bill can not be sustained. This equity rests upon the ground that the separate estate of the wife is responsible for her personal engagements generally, although not charged with them specifically. This the court does not hold. Bill dismissed.

At common law the contract of a married woman was a nullity, but with a separate estate she had certain powers of contract, and she could bind her real estate by joinder of her husband and private examination, or by judgment of a court. *Green v. Branton*, 16—p. 107; 2 Blk., 349; 2 Kent, 150, 162; *Mord. Lect.*, 279.

2. Under the Constitution and statutes.

(114) BALL v. PAQUIN,

140 N. C., 83, 52 S. E., 410, 3 L. R. A. (N. S.), 307—1905.

Civil action against Paul Paquin and wife. The *feme* defendant owned a lot in Asheville, on which she and her husband built a house; they contracted with the plaintiff for certain work in regard to water and heating apparatus; the contract was in writing, containing the terms of the contract and an agreement to pay upon the proper completion of the work; the plaintiffs also filed a lien on the premises for the work. There was a verdict and judgment for the plaintiff, and defendants appealed.

CONNOR, J. The *feme* defendant does not plead her coverture, nor does it appear by the answer that she is covert, except that the male defendant informs the court that nothing can be made out of him because he has no interest in the dwelling house and lot, save as the husband of the *feme* defendant. He says, however, that he alone contracted for the work on the house which the written contract declares was being erected "by the said Hannah B. Paquin." How all of this is we do not know, except as the jury have found.

The plaintiffs put the contract of October 15 in evidence by which it appears that they had theretofore furnished some material and done some work for the defendants on the dwelling on the lot of the *feme* defendant "in the city of Asheville, on Haywood street, known as the 'Coffin lot,'" being erected by the said Hannah B. Paquin. The terms upon which the balance of the work is to be done and material furnished are set forth, and the defendants promised to pay promptly the amount due on the contract. It is signed by the defendants, acknowledged by them, and the private examination of the *feme* defendant taken and certified by a notary public in the manner and form prescribed for executing

deeds of conveyance of real estate. The jury have found that there is due the plaintiff for material furnished and work done on the dwelling, since the execution of the contract, the sum of \$1,337. In this court the plaintiffs were permitted to amend the complaint to correspond with the proof.

The defendants contend that they may have, use and enjoy the labor and material furnished, by which the dwelling is supplied with lavatories, hot and cold baths, and pay nothing for it; that the right to do all of this is secured to them by the constitution and laws of this State, because the property is the separate estate of the *feme* defendant. If this contention is correct, it would seem that our Constitution and laws are sadly in need of radical amendment.

The appeal renders it necessary to examine the statutory law and decisions of this court relied upon to sustain the defendant's exception to the judgment. It would serve no good purpose to review the numerous cases which have been before this court, in which creditors have endeavored to collect debts from married women. The construction of the Constitution and laws has received the most anxious and careful consideration of the judges who have sat upon this bench. We find that the same effort has been made in England and in many of the States of the Union to break away from the common law conception of the status of married women, in regard to their property rights and contractual capacity. An interesting history of the course of parliamentary and judicial thought and action on the subject is given by Professor Dicey in "Law and Opinion in England," 369; Pomeroy's Eq., sec. 1098, *et seq.* (3d Ed.). Mr. Bishop, vol. 1, sec. 847, says: "That since the confusion of tongues in the Tower of Babel, there has been nothing more noteworthy in the same time than the discordant and ever shifting utterances of the judicial mind on the subject." *Flaum v. Wallace*, 103 N. C., 306. It is but natural and not to be regretted that under our system of jurisprudence, in which, by the operation of three agencies, legal fiction, equity and legislation, the law is brought into harmony with society (Maine Anc. Law), the movement is slow and at times unsatisfactory. In no court in this country was the common law conception of the marital relation, with all of its incidents, more clearly and tenaciously retained than in ours. Prior to 1848 we find no statute interfering with or limiting the common law right and power of the husband over his wife's property. In respect to dower, the law was so changed that the husband could sell his land without her consent and deprive her of "her third." This was changed by Act of 1866-67 and dower as at common law restored.

It is therefore not unnatural that when by the Constitution of

1868, an entirely new theory was adopted by which it is declared that "the real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such female," etc. (Const., Art. X, sec. 6), the court should have moved with caution in giving it operation.

It would seem that this language carries with it, as an essential attribute of ownership of the wife, the power to deal with and make contracts in regard to such property, except as expressly restricted by the same instrument, as a *feme sole*. This was clearly intimated in *Withers v. Sparrow*, 66 N. C., 129. That expression was doubtless taken as an indication that this court would so hold, when the question was fairly presented. At the session of 1868-69 we find no legislation upon the subject of married women. The effect of the holding, as foreshadowed in *Withers v. Sparrow*, *supra*, would have been to adopt the English and New York doctrine, by which a married woman could contract with respect to her separate estate as a *feme sole*. At the session of 1871-72, chapter 193, an act was passed "concerning marriage, marriage settlements and the contracts of married women." The act is comprehensive in its scope and evidently drawn with care. The subject-matter, as published in the Public Laws of 1871-72, is classified under "headings," the third being, "What contracts a married woman may make with strangers." Section 17 (being section 1826 of The Code). "No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses or the support of her family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free-trader as hereinafter allowed." It would seem that the Legislature enacted this statute with full recognition of the radical change made by the Constitution, and the clear suggestion by the court that the power to contract, as a *feme sole*, was conferred as a necessary incident to the power to own property "as if unmarried." It was not supposed that the words "devise" and "with the written consent of the husband convey," used in the Constitution, referred to her power to enter into executory contracts. For the purpose of throwing around her the protection of her husband's counsel and advice, the Legislature declared that, with certain exceptions, she should not contract "without the written consent of her husband." In the absence of controlling decisions to the contrary, we should unanimously hold that she could make all manner of contracts with the written assent of her husband, and that for breach of

them her property was liable as if she were a *feme sole*. The cases which came to this court during the years 1868-1876 clearly indicate that such was the construction of the statute by the profession and laymen.

The first case is *Harris v. Jenkins*, 72 N. C., 183 (1875). The *feme* plaintiff signed a sheriff's bond as security without the written assent of her husband. This case came clearly within the words of the Act of 1871-72, and the court did not hesitate to hold that she was not bound.

Pippen v. Wesson, 74 N. C., 437 (1876), presented the question for the first time, whether under the Constitution and the Act of 1871-72 a married woman could, with the written assent of her husband, enter into an executory contract for breach of which she could be sued to judgment, and her property subjected to sale under final process. It will be noted that the statute uses the word "contract." There is no suggestion therein of any other form of obligation or remedy for breach thereof. This court held that no power to enter into an executory contract was conferred by the Constitution or statute on a married woman; that the only change made in her contractual capacity was that her separate estate, formerly called her equitable separate estate and property secured by the intervention of a trustee, was by the Constitution made her statutory separate estate, her husband occupying the position of trustee; that the only way in which such separate estate or property could be subjected to her engagements, even with the written assent of her husband, was by a specific charge or by showing a beneficial consideration; and that thereby her separate estate was charged with her obligations, not upon the theory that she had contracted a debt, but that her engagement, thus made, constituted a charge which the courts of equity had theretofore enforced.

It is not our purpose to do more than to say that this decision was based upon the view that neither the Constitution nor the statute enlarged her common law contractual capacity, and that the statute was disabling rather than enabling in its provisions, except as to the class specified. Whatever, in the light of thought and experience of thirty years, may be said of this decision, it became the accepted law of this State, and its fundamental principle with some modifications, has been followed. A number of important and disturbing results have flowed from it. A constant struggle has been going on to find some adjustment of the law to the inevitable result of the radical change made by the Constitution. Married women today are the owners of property, both real and personal, worth millions of dollars. They employ tenants and croppers and cultivate thousands of farms, engage in merchan-

dise, conduct hotels, boarding houses and almost every kind of business suited and sometimes unsuited to their mental and physical capacity. The largest possible powers have been conferred upon them in respect to the control of their property, as in *Manning v. Manning*, 79 N. C., 293, and many other cases. It has been found by an experience of thirty years that the most unexpected and often startling results have come from this condition. As a matter of everyday experience, we know that a very large portion of the industrial and commercial life of the State is under the control and subject to their judgment and opinion. It is possible that nine-tenths of the contracts entered into by them are not enforceable in the courts.

In *Harvey v. Johnson*, 133 N. C., 352, upon a review of, and in accordance with all former decisions, this court held that a note executed by husband and wife, charging her separate estate, is sufficient to bind her separate personal property; that in the absence of a privy examination it did not bind her separate real estate. In that case it appeared that the consideration inured to the benefit of her estate.

In *Flaum v. Wallace*, *supra*, such a note was held binding on her separate personal estate, although not for her benefit. This court took one step forward in the enfranchisement of married women by holding, in a well-considered opinion, in *Vann v. Edwards*, 135 N. C., 661, that the restriction upon her right to convey her land, requiring the written assent of her husband, did not apply to her separate personal estate; hence, it is now the law of this State that she can sell and transfer her personal property as a *feme sole*.

It is unnecessary to make further reference to the numerous decisions of the court in which her power to deal with her separate personal estate is discussed. *Flaum v. Wallace* and *Vann v. Edwards*, *supra*, settle her rights in this respect.

It is said, however, that a different principle obtains when it is sought to subject her separate real estate to her contractual obligations. While expressions had been used by some of the judges indicating an opinion that she could do so only by a contract executed with the formalities prescribed for the conveyance of her land, no decision was made to that effect until 1890, when the question underwent a careful and thorough consideration in *Farthing v. Shields*, 106 N. C., 289. There Mr. Justice *Shepherd*, referring to *Flaum v. Wallace*, said: "We were greatly influenced in so holding because of the power of the wife to absolutely dispose of her statutory separate personal estate by the simple assent of her husband, and we deemed it but reasonable that if she could so absolutely dispose of such property, she might exercise the lesser

power of charging it, either expressly or by necessary implication. But when we come to the statutory separate real estate, the foregoing reason fails, because under our statute law, the wife and husband can not dispose of such property unless the former has been privately examined, separate and apart from her husband." The learned justice concludes that the power to charge her separate estate is measured by her power to dispose of the same; hence, if she expressly charged the debt in that case with the written assent of her husband, "it would have been of no avail without privy examination." In further discussing the law he says that the lands of a married woman can not be charged by any undertaking on her part "unless it be evidenced by deed with privy examination." This, for the reason that she will not be permitted to do indirectly what she can not do directly. *Scott v. Battle*, 85 N. C., 184. Similar expressions are used in *Thurber v. LaRoque*, 105 N. C., 301; *Williams v. Walker*, 111 N. C., 604; *Loan Asso. v. Bank*, 119 N. C., 327; *Bank v. Fries*, 121 N. C., 241. In *Weathers v. Borders*, 121 N. C., 387, the contract was not in writing and of course there was no privy examination. The expression that she could only charge her real estate by "a regular conveyance executed as required by the statute," etc., was not necessary to the decision of the case and, as we have seen, is not required by any decision of this court. When the question came directly before the court, it was said that the cases did not hold it to be necessary that a mortgage should be executed. *Bank v. Ireland*, 122 N. C., 571.

It will be found in all these cases that the question whether it was necessary that the form of the contract should be a conveyance, was not presented. It is evident that the judges were referring to the formalities with which such contracts should be executed. In *Bank v. Howell*, 118 N. C., 271, it is said that she can not charge her separate real estate "except upon privy examination." In *Bank v. Ireland*, 122 N. C., 571, the present Chief Justice, writing in that respect for a unanimous court, referring to *Farthing v. Shields*, *supra*, and other cases, said: "Those decisions do not require that the charge shall be made by mortgage." In so far as it was intimated that no privy examination was necessary, the then chief justice and other justices did not concur.

The conclusion is irresistible that where the contract has all the elements required by the statute and is reduced to writing, assented to by the husband, and the wife is privately examined separate and apart from her husband, it is binding upon her separate real estate. In this record we have such a contract, executed with all the formalities required for conveying the property, describing it with sufficient certainty to convey, the consideration clearly set

forth, admittedly for the improvement of her separate real estate. Why is such estate not bound for the breach of her express contract, by necessary implication? It is true that she does not expressly charge it upon either real or personal estate, but she refers to her separate real estate, describing it as her property, and stating that she is erecting a dwelling thereon, and that the work and material contracted for are for such dwelling. Language not so strong was held in *Bates v. Sultan*, 117 N. C., 94, sufficient to charge her personal estate. *Brinkley v. Ballance*, 126 N. C., 393.

The decisions, while not in all respects harmonious, indicate a movement of the court towards bringing the law in this respect into harmony with our social, industrial and commercial conditions. The Legislature has to some extent responded to this demand. In so far as it is within our province to do so, we desire to express our opinion that it is desirable that the Legislature simplify the subject by giving to married women full power to enter into executory contracts, binding their property, real and personal, "as if unmarried"—removing all doubt and uncertainty either as to the form of the contract, its execution, or remedy for breach.

How far they should be restricted or protected by requiring the assent of the husband is worthy of the most careful consideration. It is manifest that the court, in its desire to so construe the statute as to prevent injustice and wrong, has been hampered by the early decisions made when we were passing from the old into the new conception of the status of married women, in respect to their rights of property and power to contract. The wisdom of the experiment was seriously doubted by many of our wisest men, both lawyers and laymen. It was probably well, when confronted with two cases in which married women had signed bonds as security, that the court should move cautiously.

We do not feel at liberty, nor is it necessary in this case, to overrule any of the decisions made in this court upon this subject. This, with the exception of *Bank v. Ireland*, *supra*, is the first case in which an executory contract was executed by the wife with privity examination. She was held liable there, because there was an express charge. In this case, in which the contract is executed with privity examination, we hold that she is liable upon an implied charge upon the separate real estate. We have not overlooked *Dougherty v. Sprinkle*, 88 N. C., 300, nor *Thompson v. Taylor*, 110 N. C., 70. In neither of these cases was there an express contract by the married woman.

We are of opinion, and so hold, that upon the pleadings and contract, His Honor correctly held that the separate real estate of the *feme* defendant was bound for the amount found to be due by the jury. The plaintiffs are entitled to enforce their lien on her prop-

erty. This court in *Thompson v. Taylor*, *supra*, said that the lien, given by the Constitution and statute for work and labor done and material furnished, was predicated upon a valid contract, and, as a married woman had no capacity to make such a contract, her property could not be subjected to such lien. This was not the point in the case. The *feme covert* had not made any contract, either express or implied. In *Smaw v. Cohen*, 95 N. C., 85, it was held that an action against a married woman to enforce a lien for an amount less than \$200 with within the jurisdiction of a justice of the peace. This court, as we construe the opinion, did not pass upon the validity of the contract. Mr. Justice *Shepherd*, in *Farthing v. Shields*, *supra*, intimated that the lien could be enforced upon a simple contract by the married woman because of the lien law. However this may be, we are of opinion that by construing section 6 in connection with section 3 of Article X of the Constitution, and section 1826 in connection with 1781 of The Code, the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman.

It is true that the lien is given for the amount due upon the debts contracted. In this connection it is permissible to give the term "contracted" the larger meaning—agreed to be paid—thereby giving a highly remedial statute an operation commensurate with its purpose. The provisions for the mechanic's and laborer's lien and for securing to the married woman her property are found in the same article of the Constitution. In this case, the principle *noscitur a sociis* is invoked to ascertain the intention of the law maker. *Sutherland Const. Sta.*, sec. 414, *et seq.* It has been held by many courts that when a married woman was empowered to contract for the benefit of her separate estate, the lien for debts contracted for that purpose attaches. *Boisot Mech. Liens*, sec. 271; *Philips on Mechanics' Liens*, sec. 96; *Carthage M. & W. Co. v. Baumann*, 44 Mo. App., 386. In *Stephenson v. Ballard*, 82 Ind., 87, it is held that a statute forbidding a married woman to encumber her separate estate, except by deed with her husband, must be so construed in connection with another statute giving a mechanic's lien as to give effect to the latter. *Greenough v. Wigington*, 11 Iowa, 435; *Appeal Germania Savings Bank*, 95 Pa. St., 329; *Kuhns v. Turney*, 87 Pa. St., 497. However this may be, the Act of 1901, chapter 617, expressly extends the lien law to the property of married women. It has been sustained in *Finger v. Hunter*, 130 N. C., 529.

We think that in the light of the authorities and upon the reason of the thing, the judgment can be sustained upon either view, that under the Act of 1871-72 (Code, sec. 1826), the *feme* defendant

is liable, and that upon a proper construction of the lien law, she is equally so.

We have examined the exceptions in the record to rulings of His Honor during the trial and do not find any error. We have taken this case under advisement from the last term and given to it our most serious consideration. We hope that the subject of the powers and rights of married women in respect to their property and contracts may attract the attention of the General Assembly and be brought into harmony with the best modern thought and conditions. The judgment must be Affirmed.

(115) REA v. REA,

156 N. C., 529, 72 S. E., 573—1911.

CLARK, C. J. On 6 April, 1908, the plaintiff, who owned 46 shares of stock in the Edenton Cotton Mills, delivered same to C. W. Rea, her husband having indorsed on the certificate as follows:

For value received, I hereby sell, assign, and transfer unto C. W. Rea the shares of stock represented by the within certificate, and do hereby irrevocably constitute and appoint W. O. Elliott, secretary, attorney to transfer the said stock on the books of the within corporation, with full power of substitution in the premises.

April 6, 1908.

Martha C. Rea.

In the presence of C. W. Rea.

On 8 April, 1908, said C. W. Rea surrendered said certificate to said cotton mill and the same number of shares were issued to him. C. W. Rea died in 1909 and the certificate of stock which had been issued to him went into the hands of his administrator. The plaintiff contends in this action that said assignment, delivery, and transfer of said stock by her was a nullity because of non-compliance with Revisal, 2107.

There is a broad distinction between conveyances and contracts. Revisal, 2107, applies only to contracts. Laws of 1911, ch. 109, provides: "Subject to the provisions of section 2107, Revisal 1905, every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried; but no conveyance of her real estate shall be valid unless made with the written assent of her husband, provided by section 6, Article X of the Constitution, and a privy examination as to the execution of the same, taken and certified as required by law." This recognizes that section 2107 applies to contracts, and that the only restriction upon conveyances by her is that constitutional one requiring the "written assent" of her husband as to conveyances of realty and her privy examination in such case.

Revisal, 2107, is equally explicit. It comes under subhead 3, entitled "contracts between husband and wife," and provides: "No contract between a husband and wife during coverture shall be valid to affect or change any part of the real estate of the wife or the accruing income thereof, for longer time than three years next ensuing the making of such contracts, or to impair or change the body or capital of the personal estate of the wife, or of the accruing income thereof, for longer time than three years next ensuing the making of such contracts, unless such contract shall be in writing, and be duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be."

An examination of section 2107 shows that it applies solely to contracts and not to conveyances; indeed, the word "contract" is used five times in that section. The object of the Legislature was clearly to prevent the wife making any contract with her husband whereby she should incur a liability against her estate which in future might prove a burden or charge upon it, or cause a change or impairment of her income or personalty. To that end not only a privy examination was required, but the certificate of a magistrate that the contract is not unreasonable or injurious to her. This provision does not attempt to apply to conveyances by her as to which the Act of 1911 retains the constitutional restriction in regard to realty, that there must be the written assent of the husband and privy examination. Had the act attempted to impose a further restriction upon the conveyance of married women of realty, such as the approval of a third person, it would be in conflict with the Constitution, which gives her the power to convey her realty, if she has "the written assent of her husband."

The majority of this court has sustained the statutory requirement of a privy examination in conveyances of realty by married women, but solely upon the ground that it is not an additional restriction, but merely a regulation to ascertain whether the wife really executed the deed.

As to conveyances by the wife of her personalty, the Constitution gives her full power of *jus disponendi*, without any restriction whatever. Nor is there any statute whatever that in any way has attempted to restrict it. This matter has been fully consid-

ered and settled by this court in a remarkably well-considered and able opinion by Mr. Justice Walker in *Vann v. Edwards*, 135 N. C., 661, which leaves nothing to be added. That case overruled *Walton v. Bristol*, 125 N. C., 419, so far as it could be construed to intimate a different conclusion. In *Sydnor v. Boyd*, 119 N. C., 481, the wife attempted to assign her life insurance policy to her husband so as to make it payable to him at her death, and guaranteed "the validity and sufficiency of the foregoing assignment." This was an executory contract which would have changed or diminished the corpus of her estate at her death, and she would have incurred liability upon her guarantee. The court held that this was a contract, and invalid because not made in compliance with the Code, 1835 (now Revisal, 2107).

If Revisal, 2107, had included conveyances, it would have been invalid as to the transfers by a married woman of her personalty, because the Constitution gives her as to them the absolute *jus disponendi*, as if *feme sole*, without any restriction whatever. It would have been invalid as to conveyances of realty, because requiring the assent of a third person over and above the "written assent" of her husband, which is the only requirement of the Constitution, and an addition to the privy examination required by statute, which has been held a mere regulation and not a restriction upon the right of the woman to convey. In this case the husband actually witnessed the transfer in writing, which, under the authority of *Jennings v. Hinton*, 126 N. C., 51, is a sufficient compliance with the requirement of the written assent of the husband to conveyance of realty.

In this case there does not appear to have been any consideration, and the assignment was not only a conveyance, but a gift. No magistrate could certify that a gift by a woman to her husband is for her benefit or does not diminish her estate. It would be a startling proposition that a married woman who by our Constitution has full control of her property, as if unmarried, can not make a present to her husband if she sees fit. It is a matter of everyday occurrence. Whether she make her husband a gift of money, a dressing gown, or a pair of slippers, it would be astonishing if she could recover it from his administrator, or from him if there should be a divorce. Of course, if the conveyance or gift by her has been procured by fraud or duress, it can be impeached just as if made to anyone else.

Summing up, the rights of married women in North Carolina as to conveyances and contracts are:

As to conveyances of personalty: There is no restriction whatever upon her right to dispose of her personalty as fully and freely as if she had remained unmarried, either in the Constitu-

tion or by any statute. *Vann v. Edwards*, 135 N. C., 661, cited with approval by Justice *Connor* in *Ball v. Paquin*, 140 N. C., 91,

As to conveyances of realty: The Constitution requires only "the written assent" of the husband. The statute superadds only a regulation providing for a privy examination, which has been upheld on the ground that it is not an additional requirement, but merely a method of ascertaining if the deed is really her voluntary act.

As to contracts: Laws 1911, ch. 109, provides that a married woman is authorized to contract and to affect her real and personal property thereby in the same manner and to the same effect as if she were unmarried, excepting only contracts whereby she may incur liability to her husband, as to which the provisions of Revisal, 2107, are retained.

The conveyance of the stock by the wife was not restricted by the Constitution or any statute. If reversing *Vann v. Edwards*, 135 N. C., 661, it were now held otherwise, the cotton mills could be held liable, and every bank, railroad company, and other corporation which has transferred stock in like cases to this. *Wooten v. R. R.*, 128 N. C., 119. While the Legislature has seen fit to guard contracts whereby a wife may incur liability to her husband, it has not attempted to restrict her right of conveyance, still less to forbid gifts by her to her husband without the approval of a Justice of the Peace.

Upon the case agreed, judgment should have been entered in favor of the defendant.

Reversed.

Since the act of 1911, given in the last case, the law of married women's contracts has been materially changed. The former law has been thoroughly treated in Mordecai's Lectures, 297-364, and an analysis of the old law by Prof. Mordecai may be found in *Vann v. Edwards*, 128—p. 431, and in Pell's Revisal, 2094. The following summary will give most of the important questions that have arisen, and indicate the changes made:

1. The **common law disability** of married women still exists, except as modified by statute. *Armstrong v. Best*, 112—59; *State v. Robinson*, 143—620; *Dougherty v. Sprinkle*, 88—300.

2. **She may contract as a feme sole—**

(a) **Where she is a free-trader.**—(1) By registration, Revisal, 2112; *Council v. Ferguson*, 153—443, explaining "free-trader" and "deal". (2) By living separate from her husband under a decree of divorce, Revisal, 2116; *Taylor v. Taylor*, 93—418; (3) Under a deed of separation, Revisal, 2116; *Smith v. King*, 107—273; (4) Where husband is declared a lunatic, Revisal, 2116; (5) When abandoned by her husband, Revisal, 2117; *Hall v. Walker*, 118—377; *Vandiford v. Humphrey*, 139—65; *Witty v. Barham*, 147—479; (6) Where the husband is an alien and out of the country, *Levi v. Marsha*, 122—565; (7) Where trading as "company" or "agent" and partners or principal not disclosed, Revisal, 2118; *Scott-Sparger Co. v. Ferguson*, 152—346.

(b) **Under Constitution, Art. X, sec. 6; Revisal, 2093.**—(1) She may dispose of her personal property by gift or executed contract, without the assent of her husband, *Vann v. Edwards*, 135—661; (2) She may devise or bequeath her property without the husband's consent, Revisal, 2098; *Tiddy v. Graves*, 126—620; (3) Leases of land running not more than

three years or beginning not more than six months from the execution, *Revisal*, 2096; (4) She may receive or collect her property, *Kirkman v. Bank*, 77—394; *Blake v. Blackley*, 109—p. 264, or deposit money in bank and check on it, *Revisal*, 2095; (5) She may be stockholder in a corporation and liable on her stock, *Revisal*, 1185; *Meares v. Duncan*, 123—203; *Smathers v. Bank*, 155—283; *Bachelor v. Norris*, 166—105; (6) Under the recent statute she may contract as if she were a *feme sole*, except in dealing with her husband, and in conveying her real estate. *Lipinsky v. Revell*, 167—508.

(c) **Under *Revisal*, 2094; *Code*, 1826.**—She may contract without the consent of her husband so as to bind her personal estate, (1) for her necessary personal expense, *Clark v. Hay*, 98—421; *Berry v. Henderson*, 102—525; *Farthing v. Shields*, 106—289; (2) for the support of the family, *Bazemore v. Mountain*, 121—59; *Clark v. Hay*, 98—421; *Rawlings v. Neal*, 126—271; (3) to pay ante-nuptial debts, *Revisal*, 2101.

3. **All other contracts affecting her personal estate must be made** (1) with the written consent of her husband, *Rev.*, 2094, and this does not enable her to make a legal contract binding on her personally, but only to reach her separate estate in equity, *Pippen v. Wesson*, 74—437; *Dougherty v. Sprinkle*, 88—300; *Loan Asso. v. Black*, 119—323. The consent of the husband may be shown by his signing a note with her, *Jones v. Craigmiles*, 114—613; *Harvey v. Johnson*, 133—352; by joining in a deed, *Bank v. Ireland*, 122—571; by signing as a witness, *Jennings v. Hinton*, 126—48; by signing an order as agent for his wife, *Brinkley v. Ballance*, 126—393; *Bates v. Sultan*, 117—94; and it would seem that the wife need not contract in writing; by endorsing a note with her, *Rawls v. White*, 127—17; *Coffin v. Smith*, 128—252; but playing on a billiard table for which she had given a note is not sufficient ratification, *Rothchild v. McNichol*, 122—556. (2) She must charge her separate estate either expressly, or by necessary implication that it is for her benefit. *Pippen v. Wesson*, 74—437; *Flaum v. Wallace*, 103—306; *Jones v. Craigmiles*, 114—613; *Bates v. Sultan*, 117—94; *Bank v. Benbow*, 150—781. The property charged need not be described, 94—247. In *Brinkley v. Ballance*, 126—393, the court says that “charging” is not necessary, but this does not seem to have been followed in other cases. *Ball v. Paquin*, 140—83. These requirements are not necessary under the present statute. *Lipinsky v. Revell*, 167—508.

4. **To bind her real estate** requires the written consent of the husband, private examination of the wife, and charging the estate. *Revisal*, 952, 953, 954; *Farthing v. Shields*, 106—289; *Ball v. Paquin*, 140—83; *Miller v. Church*, 112—626; *Ray v. Wilcoxon*, 107—514; *Smith v. Ingram*, 130—100; 142—960; *Long v. Rankin*, 108—333; *Bates v. Sultan*, 117—94; *Harvey v. Johnson*, 133—352; *Smith v. Bruton*, 137—79; *Bazemore v. Mountain*, 121—59, 126—313; *Weathers v. Borders*, 124—610; *Williams v. Walker*, 111—604; *Thompson v. Smith*, 106—357; *Hall v. Short*, 81—273; *Scott v. Battle*, 85—184; *Jeffress v. Green*, 79—330; *Newhart v. Peters*, 80—166; *Miller v. Bumgardner*, 109—412; *Bank v. Ireland*, 122—571; *Gaskins v. Allen*, 137—426; *Wood v. Wheeler*, 106—512; *Council v. Pridgen*, 153—443; *Sipe v. Herman*, 161—107; *Jackson v. Beard*, 162—105 (the husband must be of age); *King v. McRackan (N. C.)*, 84 S. E., 1027. They should execute the same deed. *Green v. Bennett*, 120—394; *Slocumb v. Ray*, 123—571; *Ferguson v. Kingsland*, 93—337; *Wynne v. Small*, 102—133. Private examination was formerly required to be taken after acknowledgment by husband and wife or proof of execution by husband, *McGlennery v. Miller*, 90—216; *Southerland v. Hunter*, 93—310; *Ferguson v. Kinsland*, 93—337; *Robbins v. Harris*, 96—557; *Hall v. Castleberry*, 101—153; *Draper v. Allen*, 114—50; *Lineberger v. Tidwell*, 104—506; but this is changed now, and it may be taken before or after such proof, *Revisal*, 953. Certificate of probate and private examination is not conclusive. *Benedict v. Jones*, 129—470; *Ware v. Nesbit*, 94—664; *McCaskill v. McKinnon*, 121—214; *Nimocks v. McIntyre*, 120—325; but if the certificate is in proper form, an innocent purchaser will be protected. *Rev.*, 956; *Butner v. Blevins*,

125—585; *Marsh v. Griffin*, 136—333; *Bank v. Ireland*, 122—571. Joinder of the husband and private examination are not sufficient without charging the estate. *Zachary v. Perry*, 130—289; but she may charge her real estate without executing a mortgage, *Bank v. Ireland*, 122—571; *Ball v. Paquin*, 140—83; she does not lose her right to homestead nor personal property exemption, nor give a lien on any specific property, unless she executes a deed of trust or mortgage. *Bank v. Ireland*, 122—571, 127—238; *Harvey v. Johnson*, 133—352; *Bailey v. Barron*, 112—54; *Strouse v. Cohen*, 111—349; *Rawlings v. Neal*, 126—271.

5. As to her **equitable separate estate**, settled upon her, her control is still further restricted to the manner prescribed in the instrument. *Hardy v. Holly*, 84—661; *Kirby v. Boyette*, 116—165, 118—244.

6. No lien existed where there was no valid contract. *Weathers v. Borders*, 121—387, 124—610. Mechanics' liens now exist under *Revisal*, 2016. *Ball v. Paquin*, 140—83; *Stephens v. Hicks*, 156—239; but not in favor of improvements made by the husband. *Kearney v. Vann*, 154—311.

7. **Failure to comply** with the statutory requirements renders the contract void, and a new promise after coverture is removed, not based on further consideration, is void. *Felton v. Reid*, 52—269; *Bank v. Bridgers*, 98—67; *Wilcox v. Arnold*, 116—708; unless the original consideration inured to the benefit of her estate. *Bridgers v. Bridgers*, 101—71; *Long v. Rankin*, 108—333; *Berry v. Henderson*, 102—525.

8. **Estoppel and fraud.**—By reason of her disability a married woman is not estopped by anything in the nature of a contract, but she may be estopped from claiming property acquired by her under an alleged contract on account of fraud. *Towles v. Fisher*, 77—p. 443; *Burns v. McGregor*, 90—222; *Wood v. Wheeler*, 106—512; 111—231; *Draper v. Allen*, 114—50; *Smith v. Ingram*, 130—100; *Scott v. Battle*, 85—184; *Bell v. McJones*, 151—85; *Gann v. Spencer*, 167—429.

9. **Contract with husband.**—Husband and wife may contract with each other as to their property, subject to the provisions of the statute. *Rev.*, 2107, 2108; *Walker v. Long*, 109—510; *Rencher v. Wynne*, 86—268; *Sydnor v. Boyd*, 119—481; *Kearney v. Vann*, 154—311; *Archbell v. Archbell*, 158—408; *Norwood v. Totten*, 166—648.

The husband may be agent for the wife, but can not bind her or her property beyond the scope of such agency. *Harper v. Dail*, 92—394; *Stout v. Perry*, 152—312; *Witz v. Gray*, 116—48; *Bazemore v. Mountain*, 121—59, 126—313; *Rawlings v. Neal*, 122—173; *Loflin v. Crossland*, 94—76; *Boyd v. Turpin*, 94—137. The wife may be the agent for the husband. *Sibley v. Gilmer*, 124—631.

10. **Husband's right to her property.**—The earnings of the wife belong to the husband, but he may allow her to take them, and they then become her separate property. *Syme v. Riddle*, 88—463; *Baker v. Jordan*, 73—145; *Grambling v. Dickery*, 118—986; *Hairston v. Glenn*, 120—341; *Cunningham v. Cunningham*, 121—413; *State v. Robinson*, 143—620. By the acts of 1913, ch. 13, the earnings of the wife may belong to her under a contract for services, and may be considered in an action by her for personal injuries. *Price v. Electric Co.*, 160—450.

The income of her estate belongs to the wife, and the husband is liable to account for it, but not for more than a year. *Revisal*, 2100; *Faircloth v. Borden*, 130—263; *Wells v. Batts*, 112—283; *Branch v. Ward*, 114—148; *Bray v. Carter*, 115—16; unless by special contract. *Battle v. Mayo*, 102—413.

She may maintain an action for the possession of her separate property against her husband, and enjoin him from interfering with the rents and profits, subject to his right of occupancy with her. *Manning v. Manning*, 79—293, 300; she may exclude him where she has had a decree of divorce. *Taylor v. Taylor*, 112—134. If the marriage and seisin were before 1868, he has his right to rents and profits as tenant by the *curtesy initiate*. *Thompson v. Wiggins*, 107—508; *Cobb v. Raspberry*, 116—137; *Morris v. Morris*, 94—613.

11. **Personal liability.**—No personal judgment can be rendered against her for her husband's debts unless she is a free-trader. *McLeod v. Williams*, 122—451; nor is she liable personally on her own contracts, except as provided by statute. *Harvey v. Johnson*, 133—352; *Green v. Ballard*, 116—144; *Sherrod v. Dixon*, 120—61. She is liable under present statute.

12. **Jurisdiction.**—The remedy against a married woman, being equitable in its nature, to reach her separate property and not to impose any personal liability, must be sought in the superior court. *Vick v. Pope*, 81—22; *Dougherty v. Sprinkle*, 88—300; *Neville v. Pope*, 95—346; *Berry v. Henderson*, 102—525; *Baker v. Garriis*, 108—218; *Weathers v. Borders*, 124—610; but the defect of coverture must appear upon the face of the proceedings to render the judgment void. *McAfee v. Gregg*, 140—448; *Rutherford v. Ray*, 147—253. Under the present law, in a proper case, a justice may have jurisdiction, and the husband is not a necessary or proper party. *Robinson v. Jarrett*, 159—165; *Lipinsky v. Revell*, 167—508. Where the contract is made by her as a free-trader or for ante-nuptial debts, a justice of the peace will have jurisdiction under \$200. *Harvey v. Johnson*, 133—352; so where jurisdiction is fixed by statute, as in case of a lien. *Finger v. Hunter*, 130—529; *Smaw v. Cohen*, 95—85. Where it is sought to charge the separate estate, the complaint should describe the property. *Witz v. Gray*, 116—48.

13. **Conflict of laws.**—Where the contract is made in another State, the court will presume that the common law is in force. *Terry v. Robbins*, 128—p. 142. But where a married woman domiciled in another State executes a note, valid under the laws of that State, it will be enforced here. *Taylor v. Sharp*, 108—377; *Wood v. Wheeler*, 111—231; *Bank v. Granite Co.*, 155—43; but if she is domiciled here and the contract made is valid *in loco solutionis*, it will not be enforced against her here, if not in accordance with our law. *Armstrong v. Best*, 112—59; *Bank v. Howell*, 119—271. A deed or mortgage executed in another State for land in this State, is void without joinder of husband and private examination. *Smith v. Ingram*, 130—100.

CHAPTER VII.

REALITY OF CONSENT.

Sec. 1. Mistake.

1. As to the instrument.

(116) DELLINGER v. GILLESPIE,

118 N. C., 737, 24 S. E., 538—1896.

The defendant signed an order for the plaintiff to put up lighting rods, and in an action for the price, the defendant set up as a defense that there was a mistake in the writing, and that it did not contain their contract. Judgment for the plaintiff, and defendant appealed. Affirmed.

MONTGOMERY, J. . . . The order was signed by the defendant simultaneously with the making of the contract, whatever the contract was. The defendant could read and write, and he signed the paper, according to his own testimony, voluntarily. The plaintiff made no attempt to conceal any of its provisions, handed it to him to read, practiced no trick or surprise on him to induce him to execute it, and as a matter of fact the defendant commenced to read it. He said, as a witness for himself on the trial, that "He (plaintiff) pulled out the paper and showed it to me. Then I signed the paper. I didn't hardly get the first line. I saw the figure '3' and thought it was three rods for the house. I asked if he would put it up today, and he said he would put it up tomorrow." It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it. In *Boyden v. Clark*, 109 N. C., 669, it is said by the court: "If a prudent person, in the exercise of ordinary care and occupying his position, would, by prosecuting his inquiries further or extending his investigations, have ascertained the truth before acting, relief would be refused on the ground of negligence." If we will apply this principle to the case before us, we will see that the defendant's negligence was inexcusable. . . . No error.

(117) BEAN v. W. N. C. R. R. CO.,

107 N. C., 731, 12 S. E., 600—1890.

Civil action to recover damages for injuries sustained. Among other defenses the defendant pleaded a release under seal by the plaintiff. The plaintiff replied that the release was executed by mistake. There was a verdict and judgment for the plaintiff, and defendant appealed.

MERRIMON, C. J. (After discussing other questions presented.) We are of opinion that there was evidence of mistake, surprise and undue advantage taken of the plaintiff, under such circumstances as ought to avoid the release relied upon by the defendant, if the allegations of the reply were true, as the jury found them to be. The release was executed within a few days after the plaintiff sustained the injuries, at the instance of the defendant through its agent, while he was suffering great bodily pain and mental anxiety occasioned by such injuries, when he was unable to comprehend the meaning and effects of the release. He was ignorant, unable to write, and did not understand or comprehend the purport of such instrument. The defendant owed him wages, and he believed, when he executed the release, that he was giving a receipt for a part of the sum due him for wages. The jury so find by their verdict in response to the pertinent issues submitted to them, except in a single respect. The evidence tended to prove that the defendant's agent at Hot Springs, within a few days after the plaintiff sustained the injury, sent him on its road to Salisbury, a distance of 150 miles or more, where, at the office of the defendant, its agent took the release in question, paying as consideration therefor thirty dollars. The evidence also tended to show that the damages so sustained were greatly in excess of that sum. There was evidence tending to prove the substance of the allegations of the reply in respect to the release. It was in evidence for the defendant that its agent took the release. He testified that the release—its purpose—was explained to the plaintiff. It did not appear that the plaintiff had counsel or any friend to advise him other than the agent of the defendant.

Granting that there was no positive fraud on the part of the defendant or its agents (none was alleged), there was evidence to prove, and the jury found, under appropriate instructions from the court not objected to, that the plaintiff executed the release by mistake, occasioned by ignorance, physical pain, mental anxiety and lack of capacity, under the circumstances, to understand or comprehend the nature and purpose of such release.

The court of equity will grant relief where only the party com-

plaining makes mistake, when the facts and circumstances give rise to the presumption that there has been some undue influence, misapprehension, imposition, mental imbecility, surprise, or confidence abused. Mere ignorance, mere inadequacy of consideration, mere weakness of mind, mere mistake on the part of one party, will not entitle that party to relief. But it is otherwise when there is a combination of such things to prejudice the party. In such case, in good faith and fair dealing, the adverse party ought to see and know, that the complaining party was not fit or in such mental condition as to bind himself by contract. A court of equity will interfere when called upon to relieve a party against his mistake, made under a combination of such adverse circumstances as certainly destroy his capacity to know the nature of the contract or engagement to which he becomes a party. *Buffalow v. Buffalow*, 22 N. C., 241; *Futrill v. Futrill*, 58 N. C., 61; *Barnes v. Ward*, 45 N. C., 93; *Story's Eq. Jur.*, secs. 119, 120, 134, 251; *Smith's Man. Eq.*, 45.

As we have said, the plaintiff does not allege, in the reply, positive fraud of the defendant, nor mutual mistake, nor undue influence, nor simply weakness of understanding. He alleges such a combination of facts and circumstances, and produces evidence to prove the same, as show such mistake and surprise on his part as entitles him to have the release declared inoperative and void. So that the special instructions asked for, other than those particularly referred to above, have no material pertinency.

Judgment affirmed.

A deed executed by mistake, where the grantor only intended a power of attorney, will be canceled. *Miller v. Miller*, 89—209. Where the party does not sign the instrument which he intended to sign, and is not guilty of negligence, there is no contract, because the minds have not met. *Clark Cont.*, 197; 9 *Cyc.*, 388; 20 *Am. & Eng. Encyc.*, 811. See *Fraud in Factum*, *post.* *West v. R. R.*, 151—231, 154—24; *Moriarity v. Traction Co.*, 154—586; *Hayes v. R. R.*, 143—125; *Douglas v. Matting*, 29 *Iowa*, 498, 4 *A. R.*, 238; *Mills v. Stevens*, 3 *Pa. St.*, 21, 45 *A. D.*, 621; 6 *R. C. L.*, 624.

2. As to the identity of the person.

(118) NEWBERRY v. N. & S. R. R. CO.,

133 N. C., 45, 45 S. E., 356—1903.

The plaintiff sued the defendant for fifty boxes of Gold Dust Washing Powder, and Fairbanks Company was allowed to come in as defendant and claim the property. The goods were shipped to A. Alexander. The plaintiff claimed as purchaser from one Arthur Alexander, and the company claimed to have shipped the goods to one Alfred Alexander. Arthur Alexander, who was insolvent, claimed to have bought the goods, while Alfred Alexander,

who was solvent, said he had not ordered any goods. The agent of the company said that the goods were intended for Alfred Alexander, and the company contended that Arthur practiced a fraud on them in obtaining the goods under the name "A. Alexander," taking advantage of the financial standing of Alfred.

There was a verdict and judgment for the defendant, and plaintiff appealed.

CONNOR, J. The pleadings and testimony present for determination the simple question whether the plaintiff was the owner of the goods in controversy. To maintain this proposition it was incumbent upon the plaintiff to show that the title had passed from the Fairbanks Company to Arthur Alexander, from whom he purchased. It appears that there was in the neighborhood one person whose real name was Arthur B. Alexander and another whose real name was Alfred Alexander. Conceding that Arthur ordered the goods in the name of A. Alexander and the Fairbanks Company shipped them, supposing that they were ordered by Alfred Alexander and intending to sell and ship to him, and not to Arthur, no title passed to the latter. In the name "A. Alexander" there was a latent ambiguity, due to the fact that there are two persons having the same initials and in the same neighborhood. It was clearly competent to show, by the testimony of the shipper of the goods, to which of these two parties he sold and consigned the goods. The testimony of the witness, Sheckley, is uncontradicted, and, if believed by the jury, puts an end to the controversy. There was no contract of sale by the owner of the goods to Arthur Alexander. This view of the case was presented to the jury by His Honor, and, without regard to the other questions discussed in this court, their finding entitled the defendant to judgment.

While it was not necessary to pass upon the question of fraud, we think His Honor's observation, "That there was considerable evidence of fraud as to Arthur Alexander," had abundant foundation from the uncontradicted testimony.

The judgment of the court being that the defendant, Fairbanks Company, is entitled to recover the value of the goods, it being admitted that they could not be delivered in specie, we find no error in the record or the judgment, and the same is affirmed.

See 24 Am. & Eng. Encyc., p. 1034, n. 9; *Cowan v. Fairbrother*, 118—406; *Edmunds v. Merchts. Trans. Co.*, 135 Mass., 283; *Barker v. Dinsmore*, 72 Pa. St., 427, 13 A. R., 697; *Hickey v. McDonald Bros.*, 44 So., 201, 13 L. R. A. (N. S.), 413; *Cundy v. Lindsay*, 3 App. Cas., 459, 6 E. R. C., 211; *Cole v. Improvement Co.*, 61 Wash., 365, 112 Pac., 368, 24 Ann. Cas., 749 (mistake as to the color of a person).

3. Identity of the subject-matter.

MACHINE CO. v. CHALKLEY, *Ante* (4),

(119) BARBER-PASCHALL LUMBER CO. v. BOUSHALL,

168 N. C., 501, 84 S. E., 800—1915.

There were two tracts of land adjoining and owned by the same person; on one, known as the McIntosh tract, was a large lot of timber, and the other was known as the Foushee tract. The owner ran a division line so as to throw the timber over on the Foushee tract; the defendant afterward came into control of the McIntosh tract and contracted to sell it to the plaintiff; the plaintiff was buying it chiefly for the timber, and the defendant thought it contained the timber as it had done originally, but he did not intend to sell any more land than he had gotten under his title from others. The plaintiff, finding that the tract did not have the timber, sued the defendant for breach of contract. There was a judgment for the plaintiff, and defendant appealed.

Reversed.

WALKER, J. . . . It is recognized as a fundamental principle, in the law of contract, that there must be a meeting of the minds of the parties on the same thing at one and the same time. It is true that when the parties have expressed their agreement, either oral or written, in terms that are explicit and plain of meaning—that is, when their minds have met on the terms of the contract—it may not be revoked or altered by reason of the mistake of "one of the parties alone, resting wholly in his own mind," there being no fraud or misrepresentation by the other, but, where essential terms of an agreement are ambiguous, so much so as to be fairly and reasonably susceptible of different interpretations, and it is clearly made to appear that these terms have been used and intended by one of the parties in one sense and by the other in a different sense, in such case there has been no meeting of the minds on the terms of the contract, and, unless some facts have arisen creating an estoppel or rendering such course altogether inequitable, the agreement or attempted agreement should be set aside, and the parties placed in *statu quo*. This was held in substantially these terms in *Stong v. Lane*, 66 Minn., 94, 68 N. W., 765, a case not unlike the one before us, and the principle will be found very generally approved in the decided cases and text-books of approved excellence. *Machine Co. v. Chalkley*, 143 N. C., 181, 55 S. E., 524; *Lumber Co. v. Wilson et al.*, 51 W. Va., 30, 41 S. E., 137; *Silliman v. Gillespie*, 48 W. Va., 374, 37 S. E., 669;

Conlan v. Sullivan, 110 Cal., 624, 42 Pac., 1081; Chamberlaine v. Marsh's Admr., 20 Va. (6 Munf.), 283; Werner v. Rawson, 89 Ga., 619, 15 S. E., 813; Kyle v. Kavanagh, 103 Mass., 356, 4 Am. Rep., 560; Rice v. Dwight Mfg. Co., 2 Cush. (56 Mass.) 80; Fink v. Smith, 170 Pa., 124, 32 Atl., 566, 50 Am. St. Rep., 750; Bingham v. Bingham, 27 Eng. Rep. Repr. Chan., 7, 934; Cooper v. Phipps, Cooper *et al.*, L. R. Eng. & Ir. App. Cases, vol. 21, p. 49; Pomeroy, Eq. Jurisprudence, sec. 856; Pomeroy on Contracts, secs. 250, 251; 29 A. & E. (2d Ed.), pp. 664, 665; 9 Cyc., 398.

This being the established position, the case before us, as heretofore stated, is one which, in our opinion, clearly calls for its application, the facts showing that the description in the contract is ambiguous, and that both parties, designing, the one to sell, and the other to buy, the timber, and honestly believing that the defendant owned it, entered into a contract for the land on which it was supposed to be situate, and in the written instrument the plaintiff used and intended to use the descriptive terms as covering the McIntosh place as it formerly was, "the land commonly known as the McIntosh tract," and the defendant intended to confine the contract to that part of the McIntosh place which he controlled. . . .

On the record, it must be adjudged that there has been no contract between the parties; that the verdict, establishing a breach of same and assessing damages for such breach, be set aside. And, it appearing from the pleadings that the plaintiff has paid on the contract the sum of \$565, he is entitled to recover this sum and interest thereon from time of payment, and, on repleader by defendant, he is entitled, as an offset to this sum, to the value of the timber as it stood on the ground and which was cut by plaintiff from the part of the McIntosh place owned by the defendant while he was acting under the agreement as he understood it to be. . . .

See Sherwood v. Walker, 66 Mich., 568, 33 N. W., 919, 11 A. S. R., 53; Raffles v. Wichelhaus, 2 Hurl. & C., 906, 6 E. R. C., 198; 6 R. C. L., 621.

4. As to the existence of the subject-matter.

(120) POOL v. ALLEN,

29 N. C., 120—1846.

Action of *assumpsit*. The plaintiff was indebted to the defendant in the sum of \$23.85, and being about to remove to another State, appointed two persons, Long and W. Pool, his agents, with instructions to pay his debt. The defendant had given the debt to one Bumpass, a constable, to collect, and W. Pool paid the debt

to Bumpass. Some time afterward Long saw the defendant and told him he would pay the debt as soon as he saw Bumpass; the defendant said that he was the proper person to receive the money, and that if Long would pay him he would stand between him and danger. Long then paid him the debt, and when he learned that Pool had already paid it to Bumpass, he demanded it from the defendant, and suit was brought. The defendant contended that the plaintiff could not recover because Bumpass had not paid over the money, and because the payment by Long was voluntary. There was a verdict and judgment for the plaintiff, and defendant appealed.

RUFFIN, C. J. The payment to Bumpass discharged the debt. It made no difference, that he did not pay the money over. That was between him and his principal, Allen. As he was Allen's agent, with authority to receive the money, the payment of it to him was the same as payment to the creditor personally. Then, as the debt was discharged, the second payment, to Allen himself, was without consideration, and made by mistake; and the case is, therefore, one of those common ones, stated in the books, in which the action for money had and received lies. The second payment was not voluntary, in any sense that can affect this action. It is true, it was not illegally exacted by process or by duress. But that is not the criterion. Money paid as a debt, under a mistake, and where no debt exists, may be recovered back, although there was no compulsion on the person to make the payment. There was no intention here to make a gift of the money, so as in that sense to constitute it a case of a voluntary payment. On the contrary, it was clear that the money was paid and received in discharge of a debt then believed to subsist. In that there was a total mistake on the part of the person making the payment, and, probably, on that of the receiver also; and it is plain that money, thus got under a mistake, and for no consideration, can not be kept *ex aequo et bono*. On that ground then the plaintiff was entitled to a verdict. But here the case goes further, and sets out in substance an express promise to return the money, if it were not then properly payable to the defendant. It was said, indeed, that the defendant's promise was to indemnify Long against personal loss, and did not extend to the present plaintiff. But clearly the promise must be considered as made to Long in the character in which he was then acting, namely, as the plaintiff's agent. The case is one, therefore, in which there can be no hesitation in affirming the judgment.

Where payment is made with a knowledge of all the facts, the money can not be recovered, even though there should be no debt. *Devereux v. Ins. Co.*, 98—6; *Barnhardt v. R. R.*, 135—258; *Matthews v. Smith*, 67—374; *Comrs. v. Comrs.*, 75—240; *Comrs. v. Setzer*, 70—426; *Brummitt v.*

McGuire, 107—351. Neither can it be recovered if paid under legal process. *Adams v. Reeves*, 68—134; or with the means of knowledge in reach. *Bank v. Taylor*, 122—p. 570; *Jones v. Jones*, 118—p. 447; *Newell v. March*, 30—441. This is upon the idea that there is no mistake, or only a mistake of law. If payment is not voluntary, it may be recovered. *Lyle v. Siler*, 103—p. 265; and in *Hauser v. McGinnas*, 108—631, where the express agent had paid the money twice, the court says he could recover from the defendant, even though he had been negligent, on account of the fraud of the defendant. *Simmons v. Vick*, 151-79; *Nordyke & Marmon Co. v. Kehlor*, 155 Mo., 643, 78 A. S. R., 600; *Couturier v. Hastie*, 5 H. L. Cas., 673, 6 E. R. C., 204; 9 Cyc., 399.

5. As to the nature of the subject-matter.

(121) PARKER and others, Executors, v. LEATHERS,

55 N. C., 249—1855.

NASH, C. J. This case is essentially different from *Nixon v. Lindsay* (55 N. C., 230), decided at this term. That was a bill to equalize partition made by distributees. The negroes were divided into lots intended to be equal. In that assignment to the plaintiff was one known to be sick, but her sickness was not considered to be dangerous. In a short time she died from an incurable disease, which she had at the time of the partition, though unknown to the parties; and the plaintiff prayed for contribution from the other distributees, which was granted by the court. The case now before us is to call the defendant to account, as one of the executors of Joseph Armstrong. The plaintiffs, together with the defendant Leathers, were coexecutors. By his will, the testator made a large bequest of slaves to his widow, during her life. Among them was one by the name of Jacob, who, together with the other property bequeathed to the widow, was, after her death, sold by the executors as part of the estate. The defendant Leathers, with the consent of all interested, purchased the negro Jacob, at the price of \$725, took him into possession, and made sundry payments amounting in the whole to \$168. In about sixteen months Jacob died, and the defendant refused to pay anything more, upon the allegation, that at the time of the sale and purchase, the negro was unsound with a mortal disease which subsequently put an end to his life. No fraud is alleged. This defense presents the case of a purchaser refusing to pay for a slave he has purchased, without any allegation of fraud, or taking any warranty, but merely on the ground that he was unsound at the time of the sale, and that unknown to the vendor. Equity takes care of those who take care of themselves. In a parol sale of personal property there is no implied warranty of soundness, and the defendant ought to have taken a written conveyance with a covenant of soundness. He has not done so, and must account for the price of Jacob, deducting the payment made by him.

(122) WOOD v. BOYNTON,

64 Wis., 265, 54 A. R., 610—1885.

The plaintiff was the owner of a small stone, of which she did not know the value; she offered to sell it to the defendant, who was a jeweler; he examined it, told her he did not know what it was, and offered her one dollar for it; later she sold it to him for one dollar; and afterward it was ascertained to be a diamond worth \$700. The plaintiff then offered to return the money, demanded the stone, and brought this action to recover it. There was a judgment for the defendant, and the plaintiff appealed.

Affirmed.

TAYLOR, J. . . . The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold—a mistake, in fact, as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterward accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she can not repudiate the sale because it is afterwards ascertained that she made a bad bargain. *Kennedy v. Panama, etc., Mail Co.*, L. R., 2 Q. B., 580.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the

vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. *Kennedy v. Panama, etc., Mail Co.*, L. R., 2 Q. B., 587; *Street v. Blay*, 2 B. & Ad., 456; *Gompertz v. Bartlett*, 2 El. & Bl., 849; *Gurney v. Wormersley*, 4 El. & Bl., 133; *Ship's Case*, 2 De G., J. & S., 544. Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her \$500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or if she had been so told still she knew it was not a diamond. *Street v. Blay*, *supra*.

It is urged with a good deal of earnestness on the part of the counsel for the appellant, that because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made. When this sale was made the value of the thing sold was open to the investigation of both parties, neither knew its intrinsic value, and so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. . . . The following cases show that in the absence of fraud or warranty the value of the property sold, as compared with the price paid, is no ground for the rescission of the sale. *Wheat v. Cross*, 31 Md., 99, 1 A. R., 28; *Lambert v. Heath*, 15 Mees. & W., 487; *Bryant v. Pember*, 45 Vt., 487; *Kuelkamp v. Hidding*, 31 Wis., 503, 511.

However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law. Judgment affirmed.

The parties should protect themselves by making the quality a material

part of their agreement, since where the mistake is not about the article itself but as to some collateral matter, as the value, etc., the contract is binding. *Kyle v. Kavanagh*, 103 Mass., 356, 4 A. R., 566; *Hecht v. Batcheller*, 147 Mass., 335, 9 A. S. R., 708; *Page Cont.*, secs. 155, 156; *Clark Cont.*, 203; 20 Am. & Eng. Encyc., 811; 9 Cyc., 397. In the case of *Sherwood v. Walker*, 66 Mich., 568, 33 N. W., 919, 11 A. S. R., 53, the defendant sold a cow which he supposed to be barren, and the plaintiff was buying the cow for beef; before the cow was delivered to the plaintiff the defendant discovered that the cow was a breeder, and therefore much more valuable, and refused to comply with the trade; the court held that there was no contract.

6. As to the terms, quantity, price, etc.

(123) BORDEN v. RAILROAD,

113 N. C., 570, 18 S. E., 392, 37 A. S. R., 632—1893.

Civil action for damages for breach of contract. The plaintiff wishing to ship cotton from Goldsboro to Liverpool, asked the defendant's agent for rates. The agent gave a rate of sixty-nine and a half cents, but the defendant claimed that the rate was eighty-nine and a half cents, and that the telegraph operator made a mistake in transmitting it. The plaintiff was compelled to pay the latter rate, and brought this action to recover the difference. The telegraph line was operated by the defendant company. There was a verdict and judgment for the plaintiff, and defendant appealed.

BURWELL, J. It is conceded that the local agent of the defendant at Goldsboro made a written offer to ship for the plaintiff 500 bales of cotton to Liverpool in November, 1891, and that the said agent was authorized to make such a proposal on the part of the defendant, and that plaintiff at once accepted this offer, his acceptance being also in writing. Furthermore, it seems to be conceded that the said agent plainly and unequivocally expressed what he understood to be the price to be charged by the defendant company for the transportation of the cotton, and there was no misunderstanding between the plaintiff and the agent as to any of the terms of the alleged contract.

Now it is evident that, if the agent is considered, not as the mere mouthpiece of the defendant corporation through whom the intention of its higher officers in this matter was to be simply communicated to the plaintiff, but as its authorized contracting agent—its *alter ego* in this affair—there was no error or mistake at all, much less one that would prevent the written proposal and its written acceptance from constituting a valid contract, by the plain terms of which each party would be bound. In this view of the matter there was no variance between the intention of the defendant and the expression of that intention. The contracting

agent expressed in unequivocal language exactly what he intended to express. The plaintiff accepted the offer thus made to him. The defendant can not escape liability on this contract by asserting that its agent would not have so conducted himself if he had known at that time what he was afterwards informed of. And it might well be insisted on the part of the plaintiff that, in the absence of notice to the contrary he had a right to assume that that agent had power to act for his principal in this matter, and that defendant should not be allowed to dispute that authority.

Passing by that question and assuming, for the sake of argument, that the local agent at Goldsboro was the mere mouthpiece or spokesman of the defendant in this matter, and that plaintiff knew this fact, then we have here a variance between the intention of the proposer (the defendant) and the expression of that intention. There was an error in the expression of the defendant's intention, but that error was unknown to the plaintiff. He had no good reason to suspect that the writing submitted to him did not correctly express the intention of the defendant. He did not "snap up" an offer which he knew or suspected was erroneously expressed. He merely accepted a plainly expressed proposition. In the view of the matter we are now taking, the question, then, is: If, in the expression of the intention of one of the parties to an alleged contract, there is error, and that error is unknown to and unsuspected by the other party, is that which was so expressed by the one party and agreed to by the other a valid and binding contract, which the party not in error may enforce? The law is well settled, says Mr. Lawson in his work on Contracts, sec. 206, that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence or oppression, and it judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them. And Wharton in his work on the same subject, sec. 196, quotes from *Tamplin v. James*, L. R., 15 Ch. Div., 215, this general rule, as he denominates it: "Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant can not be allowed to evade the performance of it by the simple statement that he has made a mistake. But, he adds, "where a proposal evidently contains a mistake, an acceptor, by snapping at it, will not be permitted to take advantage of the mistake." In section 202a he announces the rule thus: "A unilateral mistake of expression of one party can not be set up by him as a ground for rescinding the contract or for resisting its enforcement, when his language was accepted by the other party in its natural sense. But when the blunder made by the proposer is obvious, an acceptor will not

be allowed, by catching it up, to take an unfair advantage." An essential bilateral error as to the nature of a contract avoids it, if based upon such error, but a unilateral error will not have that effect. Bishop on Contracts, secs. 701, 702. "It would open the door to fraud if such a defense was to be allowed. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side." *Tampplin v. James*, *supra*. We must consider also that "one of the remarkable tendencies of the English Common Law upon all subjects of a general nature is to aim at practical good rather than theoretical perfection, and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business." 1 Story Eq. Jur., sec. 111.

We think, therefore, that all evidence in regard to plaintiff's purchase of the cotton was irrelevant. He had a valid contract for its shipment at 69½ cents. His rights thereunder could not be affected by a notice that the defendant's agent had been misinformed, as we have seen.

Hence, we need not consider the exception taken by the defendant to the admission or exclusion of evidence relating to that part of the controversy. Under the law as we hold it to be, it being admitted that the plaintiff had been required to pay more than the contract price for the shipment of his cotton, he was entitled, as His Honor held, to recover the difference between the sum so paid and the contract price. Affirmed.

In *Pegram v. Telegraph Co.*, 100—28, the plaintiff sent to a broker the message, "Party offers 100 shares C. C. & A. stock at forty-three. Answer quick." The telegraph operator transmitted it "forty," and it was accepted by the broker in that way. The court held that there was no contract between the plaintiff and the broker, and that the defendant company was not liable for anything paid by the plaintiff to the broker on account of the transaction. Some courts hold that this is a binding contract because the telegraph company is the agent of the party making the offer. See *Clark Cont.*, 204, and note.

A mistake of one party will not entitle him to relief, but where there is a mutual mistake, or a mistake of one party and fraud, imposition, etc., on the part of the other, the court will grant relief. *Jones v. Warren*, 134—390; *Lehew v. Hewett*, 130—22; *Day v. Day*, 84—408; *White v. R. R.*, 110—456; *Baynes v. Harris*, 160—307; *Wilson v. Scarboro*, 163—380. Mistake of this last kind is usually treated under the head of fraud. Where the means of information are open to both, each is presumed to act on his own judgment, in the absence of fraud. *Wilson v. Land Co.*, 77—445; *Crowder v. Langdon*, 38—476; *Capehart v. Mhoon*, 58—178; *Dellinger v. Gillespie*, 118—737; *Michael v. Michael*, 39—349. A mistake of one party not known to the other may prevent a contract being made; but if made, it is not voidable. A mistake of one known to the other, (a) if not due to the conduct of the other, is simple mistake; (b) if caused by the other innocently, it is misrepresentation; (c) if caused by his fraudulent conduct, it is fraud. *Harriman Cont.*, secs. 422, 423; *Hart. & N. H. R. R. v. Jackson*, 24 Conn., 514, 63 A. D., 177; *Cunningham Mfg. Co. v. Rotograph Co.*, 30 App. Cas. (D. C.), 524, 13 Ann. Cas., 1147; 6 R. C. L., 620; *Singer v. Grand Rapids Match Co.*, 117 Ga., 86, 43 S. E., 755.

Mistake in number of acres of land will affect the contract, if material, as where the parties are not trading for the tract as a whole without regard to the acres; "more or less" does not exclude the inquiry. *Leigh v. Crump*, 36—299; *Gentry v. Hamilton*, 38—376; *Pharr v. Russell*, 42—222; *Wilcoxon v. Galloway*, 67—463; *Anderson v. Rainey*, 100—321; *Peacock v. Barnes*, 139—196; *Smathers v. Gilmer*, 126—759; *Bethell v. McKinney*, 164—78. Mistake in calculation corrected. *Reade v. Street*, 122—301; *Comrs. v. Fry*, 127—258; *Holden v. Warren*, 118—326.

7. Mistake in the expression of the instrument.

(124) *HENRY v. SMITH* and others,

76 N. C., 311—1877.

Civil action to correct a lease. The plaintiff executed a lease to Lynch for 99 years. By mistake in drawing the instrument the consideration was stated to be \$25 paid, whereas it was intended to be \$25 to be paid annually during the term. Lynch assigned his interest to W. C. Smith, and he assigned to Thomas J. Smith.

There was a judgment for the plaintiff, and defendants appealed.

BYNUM, J. As the indenture of lease is written, executed and registered, the only construction we can put upon it is, that it conveyed the whole term for the consideration of \$25. That is admitted by the plaintiff, and hence he seeks to have the deed corrected so as to show that the consideration was the sum of \$25 annually to be paid as rent during the continuance of the term. We are satisfied that such was the meaning of the parties to the lease and therefore as between the plaintiff and Lynch, the immediate lessee, the correction of the deed could be made and so as to all subsequent assignees with notice. But the ultimate purchaser of the term, to wit, Thomas J. Smith, against whom the relief is asked, is an assignee for value and without notice. In purchasing and for his own protection, he was bound to trace back his title through all the mesne conveyances, up to the original lease made by the plaintiff. None of these furnished any notice of the mistake in the deed or that the lease was subject to an annual rental. They all showed that the entire term of 99 years was conveyed in consideration of the specific sum of \$25 in hand paid on the execution of the deed. The party seeking relief committed the mistake and is in default. The defendant is an innocent purchaser and is in no default. In such cases when one of two parties must suffer, the loss must fall upon him who is in default. He must abide by his own laches. 2 Sugden on Vendors, 360, 362.

A jury trial was waived below and the court found as a fact, that Lynch and W. C. Smith had actual notice of the mistake in

the deed and had paid rent, but that Thomas J. Smith had no actual or other notice than that contained in the several assignments.

The court decided as a matter of law that the deeds of assignment operated as constructive notice to Thomas J. Smith. In that His Honor erred. The plaintiff is entitled to the relief he asked as to Lynch and also to W. C. Smith, who is insolvent, if he desires it, but not as to Thomas J. Smith.

There is error. The judgment is reversed as to Thomas J. Smith and affirmed as to Lynch and W. C. Smith. The case is Remanded.

(125) WILSON v. SCARBORO,

163 N. C., 380, 79 S. E., 811—1913.

This action was brought to recover damages of the defendant for entering upon land and taking away certain timber. The defendant had sold to the plaintiff certain timber mentioned in their contract, with the right to cut and remove it within five years. The defendant alleged that the plaintiff was required "to cut the timber continuously after once beginning to cut, until the cutting of the same should be completed, unless while cutting the timber the price of lumber should decline, so that he could not cut the timber at a profit," and that this was omitted from the contract by the mutual mistake of the parties or by the mistake of the defendant and the fraud of the plaintiff. There was a judgment for the defendant, and the plaintiff appealed. Reversed.

WALKER, J. . . . A careful reading of the testimony has not convinced us that there is any evidence of a mutual mistake by the parties in writing their contract. A contract is the agreement of both parties, and not merely the intention of one. Their minds must meet and be in accord upon one and the same thing at the same time. *Rodgers v. Bell*, 156 N. C., 378; *Elks v. Ins. Co.*, 159 N. C., 619. "Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the court proceeds, not upon the understanding of one of the parties, but upon the agreement of both. No principle is better settled." *Lumber Co. v. Lumber Co.*, 137 N. C., 431, citing *Brunhild v. Freeman*, 77 N. C., 128; *Prince v. McRae*, 84 N. C., 674; *Bailey v. Rutjes*, 86 N. C., 520, and other cases.

It follows from this doctrine that no contract can be altered or amended in any substantial respect, except by consent of both parties or by what may be equivalent thereto. If a court finds that there has been a mutual mistake, or its equivalent, viz., that there has been a mistake of one of the parties brought about

by the fraud of the other, it will in an otherwise proper case, reform the contract, but not otherwise. The undisclosed intention or understanding of one will not answer the purpose. "The mistake, to be relieved against in equity, must be one that is mutual, material, and not induced by negligence. It must be mutual, if the complainant wishes to have the instrument *reformed*, and not simply set aside, because equity can not undertake to *reform* on the ground of ignorance or misapprehension of one of the parties as to any facts, though it may rescind. It is essential that the mistake, to be relieved against in equity, must be an error on both sides. If, however, such ignorance or misapprehension was induced or fraudulently taken advantage of by the other party, relief will be administered, but obviously on different grounds." Bispham Equity, sec. 191. "Equity will reform a written contract or other instrument *inter vivos* where, through mutual mistake, or the mistake of one of the parties induced or accompanied by the fraud of the other, it does not, as written, truly express the agreement of the parties." Eaton Eq., sec. 618; Warehouse Co. v. Ozment, 132 N. C., 839; Pelletier v. Cooperage Co., 158 N. C., 403; Dameron v. Lumber Co., 161 N. C., 498, and the same case at this term, p. 278.

The defendant's evidence in this case hardly conforms to the standard of proof required for a correction of written instruments. It tends to show a mistake in his own mind, rather than one common to the parties—his own understanding, rather than the agreement of the parties. It must have been the intention of both parties to write the contract as he now claims it should be, and to insert in it the clause alleged to have been left out.

New trial.

A mistake in the description in a deed may be corrected. Credle v. Hays, 88—321; Pugh v. Brittain, 17—34; a deed intended to convey one tract, and by mistake includes two, Newsom v. Bufferlow, 16—383; or where by mistake a deed does not contain a certain tract, Pinchback v. Mining Co., 137—171; the omission to except certain timber in a sale of land, King v. Hobbs, 139—170; or where the deed gives the wrong boundary for the lot sold, Warehouse Co. v. Ozment, 132—839; where certain notes were assigned in payment for land and there was a mistake in the calculation as to the amount, Smith v. Amis, 10—469; a receipt given for too much, Elliott v. Logan, 62—163; so with a release under seal, Turnage v. Turnage, 42—127; Motley v. Motley, 42—211; the word "heirs" may be supplied in a deed, Morris v. Quince, 109—15; Ray v. Comrs., 110—169; Vickers v. Leigh, 104—248; a guardian bond improperly drawn by mistake may yet protect the ward, Armistead v. Bozman, 36—117; a marriage settlement not drawn according to the intention of the parties, Scott v. Duncan, 16—407; Clemmons v. Drew, 55—314; a seal omitted or added by mistake, McCown v. Sims, 69—159; Lynam v. Califer, 64—572; notes executed to the wrong person, Sallinger v. Perry, 133—35; where guardian conveys to wards in wrong proportion, Scott v. Queen, 94—462; Speight v. Gatling, 17—5; Allen v. Bryant, 42—276; insurance contract corrected, Floare v. Ins. Co., 144—232; if by mutual mistake of the parties,

accident or fraud, the contract omitted something, or embraced something that ought to have been excluded, equity will grant relief. *Parker v. Morrill*, 98—p. 235; *Archer v. McLure*, 166—140; *Clements v. Ins. Co.*, 155—57; *Baynes v. Harris*, 160—307.

Whether the court will correct an executory contract within the statute of frauds and enforce it as corrected, has been variously held. *Adams Equity*, 169, and note; *Bispham Eq.*, 540, 541; such relief was denied in *Davis v. Ely*, 104—16.

Awards, correction of mistakes in, see *Eaton v. Eaton*, 43—102; *Walker v. Walker*, 60—255; *Leach v. Harris*, 69—532; *King v. Mfg. Co.*, 79—360; *Miller v. Bryan*, 86—167.

8. Mistake of law.

(126) KORNEGAY v. EVERETT,

99 N. C., 30, 5 S. E., 418—1888.

Civil action tried upon exceptions to report of referee. For the purpose of securing a debt to the plaintiff, the defendant on October 1, 1883, executed a mortgage to the plaintiff on certain lands, and also on a steamboat; the plaintiff also became assignee of a certain mortgage executed by the defendant to Weil, in 1881; in May, 1884, the defendant executed a deed of trust for all his property to John R. Smith, including the mortgaged property, and reserving his homestead, in trust to pay all his debts; the plaintiff having a greater part of the debts, entered into an agreement with the defendant and the trustee, by which he was to take a conveyance in fee simple for the lots embraced in his mortgage, surrender his debts, and release the steamboat; the plaintiff complied with his part of this agreement, and with the consent of Everett took deeds from the trustee for the lots, all the parties thinking these deeds were sufficient to convey a clear title; Everett and wife did not join in these deeds, and afterwards refused to give effect to the plaintiff's title, claiming that his homestead right did not pass. The plaintiff asked that the settlement be set aside and that he be allowed to foreclose his mortgages.

The plaintiff and the trustee both testified as to the agreement, but the defendant objected to the evidence on the ground that it was incompetent to show the agreement outside of the deeds, that the mistake was a mistake of law and without any element of fact or fraud, and the evidence was incompetent under the statute of frauds. The referee sustained the objection, and plaintiff excepted.

The Judge below held that the evidence was competent, but that it was insufficient to show a mistake in the execution of the deeds, confirmed the report, and the plaintiff appealed.

DAVIS, J. The deed executed by Smith, trustee, while purporting to convey an absolute estate in fee in the property to the plain-

tiff, by reason of the reservation of the homestead in the deed of trust to Smith, in fact conveyed an estate subject to the homestead, the defendant Everett and wife not joining the trustee in the execution of the deed to plaintiff, by reason of the mistake of all the parties, in supposing that the deed of the trustee would convey an absolute title, as it was intended it should do.

The plaintiff says that, having surrendered his claims and the mortgages by which they were secured, the defendant refuses to give effect to the agreement, but claims the homestead, and he asks that if defendant will not comply, it be rescinded.

The questions presented are:

1. Will the court correct such a mistake of law? and
2. If so, was the evidence sufficient to establish the mistake?

The evidence offered by the plaintiff to show the mistake was, upon objection by the defendant, ruled out by the referee as incompetent, but it was held by the court below to be competent, but insufficient. There was no appeal by the defendant from so much of His Honor's ruling as held that the evidence was competent, and it may be that the first question is not necessarily before us in the case on appeal, but as the sufficiency or insufficiency of the evidence would be of no consequence if the court had not the power to correct the mistake, and as that was the chief question discussed by counsel, we think it proper that it should be considered.

It is undoubtedly the general rule, as laid down by the Chief Justice in *Thomas v. Lanes*, 83 N. C., 191, "that a written instrument disposing of property or constituting a contract, can not be altered, impaired or explained by parol proof of a different purpose or understanding from that contained in the writing." And it is said by Adams (*Equity*, sec. 169): "The *prima facie* presumption of law is, that the written contract shows the ultimate intention, and that all previous proposals and arrangements, so far as they may be consistent with the contract, have been deliberately abandoned. It seems, however, that the instrument may be corrected, if it is admitted or proved to have been made in pursuance of a prior agreement, by the terms of which both parties meant to abide, but with which it is in fact inconsistent; or if it is admitted or proved that an instrument intended by both parties to be prepared in one form, has by reason of some undesigned insertion or omission, been prepared and executed in another," etc.

What was the document intended to be? If it is admitted, or, as was said in *Jones v. Perkins*, 54 N. C., 337, established by clear and convincing proof, that by mistake of the parties (and it must be the mistake of both parties if the equity rests upon

mistake) the instrument fails to express the intention of the parties, it will be corrected, and this will be done whether the mistake be one of fact or of law, as is clearly shown in *McKay v. Simpson*, 41 N. C., 452; *Hart v. Roper*, 41 N. C., 349; *Womack v. Ecker*, 62 N. C., 161; *Lynam v. Califer*, 64 N. C., 572; *Lutz v. Thompson*, 87 N. C., 334.

The question is discussed at length in *Benson v. Markel*, decided in the Supreme Court of Minnesota in May, 1887, published in vol. 36, page 44, of the *Albany Law Journal*, and after a review and citation of a great number of authorities, it is said: "A careful consideration of the authorities has led us to the conclusion that the power of courts of equity to afford relief from the consequences of the mutual mistake of parties to written instruments is not strictly limited to mistakes of fact, but extends also to mistakes of law."

The defendant relied with confidence upon the decision of this court in *Sandlin v. Ward*, 94 N. C., 490, in which it is said: "A court of equity never corrects mistakes of law, save in exceptional cases, where the mistake is mixed up with other equitable elements," etc.

Of course a court of equity will only correct a mistake when equity requires it.

Was there such an equitable element in this case?

If the plaintiff held a security for his debt, which was discharged in pursuance of the agreement, and with the understanding and intention of both parties that it should be discharged upon the execution of the deed conveying the lots contained in the deed from Smith, trustee, to the plaintiff, free from all encumbrance, and it was intended and thought by all the parties that such a title was conveyed, then would it not be manifestly inequitable for the defendant to retain the benefit derived from the release of the debts and surrender of the mortgage by the plaintiff, without giving full effect to the agreement, by securing to the plaintiff the title in fee to the land conveyed to him by the trustee? Would not the plaintiff have a right to have the contract rescinded and to be relegated to his original security?

Assuming the facts to be as alleged, the defendant can not assert any claim to the property conveyed by the deed of his trustee, adversely to that deed, without restoring to the plaintiff the security lost by him in consequence of the acceptance of that deed.

If it be said that, peradventure, the wife of the defendant will not join in the execution of such an instrument as will carry the agreement into effect, the answer is to be found in *Welborn v. Sechrist*, 88 N. C., 287, and he must make reasonable effort to comply with the agreement.

There was no error in ruling that the evidence was competent.

As to the sufficiency of the evidence to correct the mistake, the proof must be full and clear and not merely preponderant, but such as would have satisfied a chancellor or court of equity under the old practice. *Loftin v. Loftin*, 96 N. C., 94, and cases cited.

The only witnesses were the plaintiff and the defendant Smith, the trustee; there was no conflicting testimony, and if these witnesses are to be believed, the deed from Smith, trustee, to the plaintiff was intended to convey a title in fee unencumbered, and it was thought by all the parties at the time that it did convey such a title, so that, nothing else appearing, it was sufficient; but the referee having excluded this evidence, and thus rendering it unnecessary for the defendant to offer any evidence controverting, as his answer does, the facts as testified to, he has a right to be heard in denial, and this case will be certified to the end that it may be further proceeded with in accordance with this opinion.

Error.

A pure mistake of law, where the parties do exactly what they intended to do, but are mistaken in the legal effect, will not be remedied. *Bank v. Morehead*, 124—622; *Bistol v. Morganton*, 125—365; *McMinn v. Patton*, 92—371; *Jones v. Jones*, 118—440; *Grantham v. Kennedy*, 91—153; *Bispham Eq.*, 283. But a mistake as to the existence of a legal right is generally considered a mistake of fact. *Estis v. Jackson*, 111—145; *Hart v. Roper*, 41—349; *Powell v. Cobb*, 56—456. A mistake as to a foreign law is a mistake of fact. *Clark Cont.*, 206; *Condor v. Secrest*, 149—201; *Pelletier v. Cooperage Co.*, 158—403; *Dolvin v. Am. Harrow Co.*, 125 Ga., 699, 54 S. E., 706, 28 L. R. A. (N. S.), 785; *Osincup v. Henthorn*, 89 Kan., 58, 130 Pac., 652, 46 L. R. A. (N. S.), 174.

Evidence to show mistake for correction must be clear, strong and convincing. *Lehew v. Hewett*, 138—6; *Ely v. Early*, 94—1; *Harding v. Long*, 103—1; *Pollock v. Warwick*, 104—638; *King v. Hobbs*, 139—170; *Warehouse Co. v. Ozment*, 132—839. An apparent clerical error in a deed, as in writing east for west, will be overlooked. *Wiseman v. Green*, 127—288; *Gray v. Jenkins*, 151—80; *Torrey v. McFadyen*, 165—237; *Ipock v. Gaskins*, 161—673.

For discussion of mistake generally, see 1 Page Cont., secs. 58, 71-84, 155, 171-174; *Harriman on Cont.*, sec. 290; *Clark Cont.*, 196-208; *Bishop Cont.*, secs. 228-238; 6 Cyc., 388, *et seq.*; 20 Am. & Eng. Encyc., 807, *et seq.*; 4 L. R. A., 483; 5 L. R. A., 152; 6 L. R. A., 835; 12 L. R. A., 273; *Adams Eq.*, 168, *et seq.*; *Bispham Eq.*, secs. 185-191; 2 Pom. Eq. Jur., sec. 838, *et seq.*; 6 R. C. L., 620.

Sec. 2. Misrepresentation.

(127) FOLLETTE v. THE MUTUAL ACCIDENT ASSOCIATION,

110 N. C., 377, 14 S. E., 923, 15 L. R. A., 668, 28 A. S. R., 693—1892.

Civil action to recover on an insurance policy. The defendant appealed from the judgment rendered.

AVERY, J. . . . There is no branch of the law as to which,

in all of its ramifications, there is so much conflict in the rulings of the various courts of appeal, and so great a diversity of opinion amongst respectable text-writers, as that governing the rights and liabilities of insurers.

When the universal custom was that the underwriter sat in his city office and issued policies of insurance, relying solely upon the representations of the applicant for information, whether as to his own physical state or as to the value, condition and surroundings of his buildings, the insurer would have dealt at a great disadvantage with the unreliable class of his customers, if a contract procured by false representations had not been declared fraudulent and void, or if the disregard of stipulations intended to insure the observance of ordinary care in the habits of a person, or the use of a building, had not been held sufficient to defeat a recovery upon the death of a person or the destruction of the property insured. But when, in the new order of things, the active competition between companies brought to every man's door a soliciting agent, furnished with instructions and advised as to his duties by the best trained business men and ablest lawyers in the country, the shrewdest and most unscrupulous of applicants could hope to get no advantage, and the untrained or uneducated among the number labored under a decided disadvantage in answering questions, not always comprehended in all of their bearings, and in receiving subsequently from its chief office, in a distant city, the contract of the company, limiting its own liability and imposing new duties upon the insured by means of conditions never heard of before the issuing of the policy, and often never read, or imperfectly understood afterwards. *Ubi eadem ratio, ibi idem jus.* When custom reverses the condition of the parties, it would be strange if the law should undergo no modification.

The local agent of the defendant company testifies that with a knowledge of the deafness of the plaintiff he filled out his application for an accident policy, signed his own name on the back of it, and forwarded it to the principal office in New York. The policy came in due course of time and was delivered to the plaintiff, who paid all of the premiums assessed against him, until he was so seriously wounded in his arm by the accidental discharge of a gun, in the hands of a friend, as to make amputation necessary. The company took a receipt by way of compromise, which, under the findings of the jury, is not evidence of payment, and, as there was no exception to the rulings or charge involving the question of payment or satisfaction, we are brought to the consideration of the leading point. In the application for membership is the following paragraph:

"I have never had, nor am I subject to, fits, disorders of the

brain, . . . or any bodily or mental infirmity, except had an attack of rheumatism six years ago."

The defendant now contends that the representation by the plaintiff that he was free from bodily infirmity was false and fraudulent, and constituted a material inducement to the defendant to issue the policy. Ordinarily, the defendant could avoid the performance of the contract by showing the falsity of a material statement in the application. But the plaintiff, where representations contained in the application are admitted to be untrue, may rebut the presumption of fraudulent intent arising from such admission by showing that the local agent of the company, with full knowledge of the falsity of the statement, entered the answers of the insured and forwarded the application, approved by his own endorsement. We can not give the sanction of this court to the doctrine that a local agent may scream into the ear of a deaf person solicitations to apply for an accident policy, write for him an answer, which he knows at the time to be untrue, to a question in the application, procure the policy, receive the premiums as they fall due, and when the insured becomes prostrate from a wound, stand aside at the bidding of the principal and allow it, with the premiums in its coffers, to avoid the contract on account of a statement known by the agent to be false when he prepared it for the applicant's signature. The reason which induced the courts to guard the underwriter against misrepresentations as to facts within the peculiar or exclusive knowledge of applicants no longer exists, when the agent of the insurer, on the ground, has as full knowledge of the truth or falsity of an application prepared by him as has the insured. *Cessante ratione, cessat et ipsa lex*. Where the local agent of a company has actual knowledge of the falsity of an answer to a question in the application which he writes for the insured, the knowledge of the agent will be imputed to the company, and it will not be allowed to avoid the contract on the ground of false warranty. 1 Am. & Eng. Enc., 333; 1 May on Ins., secs. 140—143; 2 *Ibid.*, secs. 497—501; Dupree v. Ins. Co., 92 N. C., 417; *Ibid.*, 93 N. C., 240; Hornthal v. Ins. Co., 88 N. C., 73; Fishbeck v. Ins. Co., 54 Cal., 422; Eggleston v. Ins. Co., 65 Iowa, 308; Ins. Co. v. Fish, 71 Ill., 620; Mullen v. Ins. Co., 58 Vt., 113; Shaffer v. Ins. Co., 53 Wis., 361; Ins. Co. v. McCrea, 8 Lea (Tenn.), 513.

It is not material whether we say that the conduct of the local agent amounts to a waiver or works an estoppel on the insurer, as the authorities are in conflict upon the point. 1 May, *supra*, sec. 143; 2 *Ibid.*, sec. 498. Certain, it is, that in such cases the knowledge of the agent is imputed to the principal, and "to deliver a policy with a full knowledge of the facts, upon which its validity

may be disputed, and then insist upon those facts as a ground of avoidance, is to attempt a fraud." 2 May, *supra*, sec. 497. The agent necessarily discovered, while negotiating with the plaintiff, that the latter was deaf, and it would be as unreasonable to presume that both the agent and the applicant intended to affirm that to be true which they knew to be false, as that such a patent defect as the loss of an eye in a horse did not exist. *Leslie v. Ins. Co.*, 5 T. & C. (N. Y.), 193; *Ins. Co. v. Mahone*, 21 Wallace, 152; *Brown v. Gray*, 51 N. C., 103; *Fields v. Rouse*, 48 N. C., 72.

We do not propose to go behind the verdict and the instruction upon which it was founded, and avoid the reaffirmation of the principles announced on the former hearing of this case by determining what is a bodily infirmity, since, conceding deafness to come under such designation, we think that there was no error in the rulings of the court below. As already intimated, it is immaterial whether we declare that the agent by his conduct waived objection to the inaccurate statement, or that by writing it down, or having full knowledge of the real truth of the matter, his conduct operated to estop the company, since, in view of what occurred, when the application was made out, and before, the avoidance of liability under the contract, because of the infirmity known by the agent to exist, would be fraudulent and unjust. There is

No error.

(128) BRYANT v. LIFE INSURANCE CO.,

147 N. C., 181, 60 S. E., 983—1908.

This was an action to recover upon a life insurance policy. The defense was that the insured, at the time of the application for the policy, made false representations to the company on material matters, chiefly that he had never had consumption; that he was then in sound health, and that he had not been under the care of a physician within two years. There was a judgment for the plaintiff, and defendant appealed.

HOKE, J. Our statute on insurance, in reference to the question involved in this appeal, Revisal, sec. 4808, provides: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy." And in *Fishblate v. Fidelity Co.*, 140 N. C., 589, the court, in construing this section (erroneously printed in the opinion as sec. 4646), held as follows: "1. In an action for indemnity on an accident policy, where, on an issue involving the question as to whether the plaintiff, in representing himself to be sound physically and mentally,

made a false statement on a matter material to the contract, a charge that a misrepresentation, to become material, must be as to a defect which contributes in some way to the loss for which indemnity is claimed, is erroneous. 2. Every fact untruly asserted or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium."

There are decisions apparently to the contrary in other jurisdictions, but, as shown in the opinion referred to, they were rendered usually, all of them as far as we have examined, in applying statutes having a different wording from ours and requiring a more restrictive interpretation. This being the construction we have put upon our statute—and, as the law is now expressed, it is, we think, undoubtedly the correct construction—the court below properly held that the representation of the insured as to having been under the care of a physician within two years was material to the contract; and, under the facts and circumstances disclosed by the testimony, defendant has a right to insist and the case requires that there should be a determinative finding on the issue addressed to that question, and this has not been done. . . .

New trial.

Misrepresentation is an innocent misstatement or non-disclosure of facts, as distinguished from fraud which is intentional. If the fact enters into the contract so as to become a material term, it is a condition, and may avoid the contract; if it is a subsidiary promise to become responsible for the truth of the fact, it is a warranty, in the ordinary sense, and is a ground for action for damages; if the parties stand in some relation so that one must depend upon the other for the information, the utmost good faith (*uberrima fides*) is required, and a misrepresentation may avoid the contract. In insurance contracts, this was generally called warranty, and its effect was to avoid the contract, whether material or not. 16 Am. & Eng. Encyc., 920 *et seq.*; Clark Cont., 208 *et seq.*; but this has been changed by the statute above cited. Except as a condition or warranty, and in contracts *uberrimae fidei*, misrepresentation did not affect a contract at law, but it might be ground for relief in equity. In this respect it belongs more properly under the head of fraud, in the general sense that an inequitable or unjust result would be produced.

Insurance contracts are usually classed under the head of *uberrima fides*, but under the statute they belong in respect to the representation, under fraud; so as to confidential relations generally which are treated under constructive fraud.

Other cases on the same doctrine in insurance. *McCarty v. Ins. Co.*, 126—820; *Hayes v. Ins. Co.*, 132—702; *Grabbs v. Ins. Co.*, 125—389; *Bergeron v. Ins. Co.*, 111—45; but where there is fraud on the part of the agent and the insured, the policy is void. *Sprinkle v. Ins. Co.*, 124—405, 126—678; *Cuthbertson v. Ins. Co.*, 96—480; *Mace v. Ins. Co.*, 101—p. 133; *Sugg v. Ins. Co.*, 98—143; *Bobbitt v. Ins. Co.*, 66—70, gives the rule of utmost good faith. *Fishblate v. Ins. Co.*, 140—589, sustains the rule in the principal case, and also holds that a clause in the policy that "no notice or knowledge of the agent or any other person shall be held to effect a waiver or change in this contract or any part of it," is void. *Alexander*

v. Ins. Co., 150—536; Gardner v. Ins. Co., 163—367; Schas v. Ins. Co., 166—55; Lummus v. Ins. Co., 167—654; Bates v. Hewitt, L. R., 2 Q. B., 595, 6 E. R. C., 817.

The doctrine of *uberrima fides* has sometimes been applied to sales of land, but in this State the purchaser must protect himself in the absence of fraud. Woodbury v. Evans, 122—779. It has also been applied to contracts with promoters of a corporation, but that seems to be considered under fraud in this State. Gaines v. McAlister, 122—340; Austin v. Murdock, 127—454.

Equitable estoppel.—Misrepresentation may operate as an estoppel. Bisp. Eq., 424; Saunderson v. Ballance, 57—54. This doctrine is based on fraud, Devereux v. Burgwyn, 40—351; and was first applied in equity and afterwards adopted in law by making an innocent misrepresentation of a material fact avoid a contract, either on the ground of mistake, or legal fraud, or condition. 1 Page Cont., sec. 153. In West v. Tilghman, 31—163, it was held that this estoppel did not apply at law, further than that it might be evidence that the party had parted with his interest; and in the same case, 43—183, it was held that it did not apply in equity, where the party was ignorant of his title. Jones v. Sasser, 18—452. The rule of estoppel *in pais* is, that where a man so conducts himself as to lead a reasonable man to believe that a certain state of facts exists, and to act upon such belief to his injury, the former will be estopped to deny the existence of such facts. Rainey v. Hines, 120—376; Shattuck v. Conley, 119—292; Morris v. Herndon, 113—236; Bishop v. Minton, 112—524; Boyden v. Clark, 109—664. The requisites of such estoppel are, (1) the defendant must know his title; (2) the plaintiff did not know and relied on defendant's representation; (3) the plaintiff was deceived to his injury. Holmes v. Crowell, 73—613; Loftin v. Crossland, 94—p. 83; Exum v. Cogdell, 74—139; Mason v. Williams, 66—564; Estis v. Jackson, 111—149; Lumber Co. v. Price, 144—50. See Bisp. Eq., secs. 282—294; 11 Am. & Eng. Encyc., 421 *et seq.*

Sec. 3. Fraud.

1. Elements of actual fraud.

(129) WALSH v. HALL,

66 N. C., 233—1872.

This was a civil action for the recovery of a horse which had returned to and been detained by the defendant. The defendant set up fraud in his answer, and the plaintiff demurred, the court sustained the demurrer, and the defendant appealed.

DICK, J. This is a civil action, in the nature of an action of detainue, to recover a horse from the defendant.

The defendant filed an answer, controverting some of the allegations of the complaint, and made a statement of new matter, which, he insisted, constituted a counterclaim to the plaintiff's cause of action. The plaintiff demurred, and thereby admitted the truth of the defendant's statement of new matter, and we must consider whether the admitted facts constitute a good counterclaim in this action.

The defendant alleges that he was the owner of the horse in controversy, and exchanged it with the plaintiff for a certain tract

of land, which the plaintiff wilfully and falsely represented as being contiguous to the land of the defendant—that he was very desirous of obtaining a certain adjoining tract of land, and this desire of the defendant was known to the plaintiff, and was a material inducement to an exchange of property; that the land is not adjoining, and this fact was well known to the plaintiff; and thus the horse was obtained by actual fraud from the defendant, and he asks that the contract may be rescinded. This new matter set up by the defendant, is connected with, and forms a material part of the contract, out of which this cause of action arose, and constitutes a proper counterclaim; and we must consider whether he is entitled to the relief which he demands.

The maxim of *caveat emptor* is a rule of common law, applicable to contracts of purchase of both real and personal property, and is adhered to, both in courts of law and courts of equity, where there is no fraud in the transaction. Where land has been sold, and a deed of conveyance has been duly delivered, the contract becomes executed, and the parties are governed by its terms, and the purchaser's only right of relief, either at law or in equity, for defects or encumbrances, depend, in the absence of fraud, solely upon the covenants in the deed which he has received. Rawle on Covenants for Title, 459.

If the purchaser has received no covenants, and there is no fraud vitiating the transaction, he has no relief for defects or encumbrances against his vendor, for it was his own folly to accept such a deed, when he had it in his power to protect himself by proper covenants.

But in cases of positive fraud a different rule applies. The law presumes that men will act honestly in their business transactions, and the maxim of *vigilantibus non dormientibus jura subveniunt* only requires persons to use reasonable diligence to guard against fraud; such diligence as prudent men usually exercise under similar circumstances. In contracts for the sale of land, purchasers usually guard themselves against defects of title, quantity, encumbrances and disturbance of possession by proper covenants; and if they do not use these reasonable precautions, the law will not afford them a remedy for damages sustained, which were the consequences of their own negligence and indiscretion.

But the law does not require a prudent man to deal with everyone as a rascal, and demand covenants to guard against the falsehood of every representation, which may be made, as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men, or the transactions of business, trade and commerce could not be conducted with that facility and confidence which are essential to successful en-

terprise, and the advancement of individual and national wealth and prosperity. The rules of law are founded on natural reason and justice, and are shaped by the wisdom of human experience, and upon subjects like the one we are considering, they are well defined and settled.

If representations are made by one party to a trade which may be reasonably relied upon by the other party—and they constitute a material inducement to the contract—and such representations are false within the knowledge of the party making them—and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice.

In our courts the injured party may bring a civil action in the nature of an action on the case for deceit, and recover the damages which he has sustained; and if this remedy will not afford adequate relief he may invoke the equitable jurisdiction of the court to rescind the contract and place the parties *in statu quo*.

No specific rule can be laid down as to what false representations will constitute fraud, as this depends upon the particular facts which have occurred in each case, the relative situation of the parties and their means of information. Examples are given in the books which have established some general principles which will apply to most cases that may arise. If the falsehood of the misrepresentation is *patent*, and a party accepts and acts upon it with "his eyes open," he has no right to complain. If the parties have equal means of information, the rule of *caveat emptor* applies, and an injured party can not have redress, if he fail to avail himself of the sources of information which he may easily reach, unless he has been prevented from making proper inquiry, by some artifice or contrivance of the other party. Where the false representation is a mere expression of commendation, or is simply a matter of opinion, the parties stand upon an equal footing and the courts will not interfere to correct errors of judgment. Where a matter, which forms a material inducement, is peculiarly within the knowledge of one of the parties and he makes a false representation as to that fact, and the other party, having no reason to suspect fraud, acts upon such statement and suffers damage and loss, he is entitled to relief. Whenever fraud and damage go together the courts will give a remedy to the injured party. Broom's Legal Maxims, 739; Adams Equity, 176; Story's Eq. Juris., chap. 6; Atwood v. Small, 6 Ck. & Fin., 232; Chitty on Cont., 681; Broom's Com., 347.

The courts must determine questions of fraud arising upon ascertained facts, and although the principles of law are well de-

fined and settled, errors in their application have produced some conflict in adjudicated cases.

We will now proceed to apply the principles of law to the facts admitted in the pleadings in the case before us, and then briefly review the previous cases which have been decided in this State upon a state of facts somewhat similar.

It appears that the defendant resided on Elk Creek, and was very desirous of obtaining a certain tract of adjoining land. The plaintiff knew this fact and pretended to own said land, and offered to exchange it with the defendant for the horse in controversy. The defendant at first refused to make the exchange for the reason that one Hendricks claimed the land.

The plaintiff then positively asserted that he was the owner, and had purchased the land from Witherspoon, and had a deed, and that Hendricks had no claim whatever, as he (plaintiff) had been in the actual possession and cultivation of the land, under his (Witherspoon's) deed, for more than seven years. This deed was produced, and it purported to convey a tract of land on Elk Creek; and the plaintiff asserted that he had been in the actual use and occupation of the land which he proposed to sell, for several years.

Upon these representations, which were positively made, and frequently asserted, the defendant exchanged the horse for the land, and received a deed describing the land as lying on the waters of Elk Creek. The deed was written by a nephew of the plaintiff, who kept the deeds of his uncle, and was present during the negotiations for the trade.

The defendant alleges that he has discovered that the land which he thought he was purchasing belongs to another person, and that the deed which he received covers an adjoining tract; and that the plaintiff well knew these facts at the time he executed the deed, and that his representations were false and fraudulent.

So it appears that the plaintiff, by false representation about a matter, which was a material inducement to the contract—and which was false within his knowledge—obtained the horse of the defendant. The circumstances attending the trade were such as to induce a reasonable reliance upon the truth of the statements of the plaintiff, and the defendant neglected no precaution but a survey, in guarding himself against fraud.

The transaction was like hundreds of others in the country, which are entirely fair and honest, and we do not regard the want of a survey as laches on the part of the defendant. A large majority of the sales of land, in the State, are completed by the delivery of a deed, copied from some previous deed, and surveys are not generally made, unless there is some dispute about the boundaries.

Where the grantor has been in the possession of land for a number of years, exercising acts of ownership, his positive assertion as to location may be reasonably relied upon without a survey.

In the case of *McFerran v. Taylor*, 3 Cranch, 270, Chief Justice *Marshall* says: "He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance. In this case the defendant has sold land on Hingston, and offers land on Slate. He has sold that which he can not convey, and as he can not execute his contract he must answer in damages."

If such a contract was made by fraudulent representations, a court of equity would not hesitate to rescind the contract.

In our case the plaintiff is insolvent, and prosecutes his unjust claim in *forma pauperis*, and the defendant would be without a speedy and substantial remedy against this gross fraud, but for the wise and beneficent provisions of our Code, which blend in one system, legal and equitable remedies.

From the facts admitted, we think the defendant is entitled to a rescission of his contract with the plaintiff, and to retain possession of the horse sued for.

We also think that the defendant might have sustained a civil action to recover damages occasioned by the fraudulent representations of the plaintiff, although this opinion seems to be in conflict with previous decisions of this court.

The case of *Fagan v. Newsom*, 12 N. C., 20, was the first case upon this subject, and was correctly decided. The plaintiff had repudiated the executory contract, which was induced by the fraudulent representations of the defendant, and had suffered no damage but the loss of a good bargain, and he could have easily recovered his purchase-money by an action of *assumpsit*. The principles for which we are contending are distinctly stated in that case, "the plaintiff can not recover in an action of deceit, unless he proves not only that a fraud has been committed by the defendant, but also that it has occasioned loss and damage to the plaintiff." Chief Justice *Taylor* says further: "It is a very reasonable principle that the purchaser should not be entitled to an action of deceit, if he may readily inform himself as to the truth of the facts which are misrepresented. In this case, the plaintiff knew that the defendant had no title to the bottom land, and that it was the property and in the possession of another." He acted with a full knowledge of the falsity of the representation and sustained no damage, and of course was not entitled to maintain his action. In contracts of this character, fraud without damage, or damage without fraud, is not usually the subject of an action for deceit.

In *Saunders v. Hatterman*, 24 N. C., 32, the fraud complained of consisted in a false affirmation of the value of the land sold. This was a matter of opinion and judgment, and the plaintiff could easily have obtained correct information, and his damage was the result of his own negligence and indiscretion.

The rules of law are correctly laid down as to when an action of deceit can be sustained, and they are in accordance with the principles which we have above stated. *Lytle v. Bird*, 48 N. C., 222, and *Credle v. Swindell*, 63 N. C., 305, are founded upon the cases above referred to, but in our opinion the principles of law are not correctly applied to the statement of facts.

For the reasons above given, we think that a purchaser of land is not required, in order to guard against the fraudulent representations of a vendor, to have a survey made, unless some third person is in possession claiming title; or there is some dispute about boundary, or as to the true location, or he has received some information which would reasonably induce him to suspect fraud. The general custom of conveying land, according to old deeds and without a survey, is sufficiently established to be reasonably relied on by a purchaser, as to description of location and boundary.

The location by a survey is a matter of science and skill, and competent surveyors are not easily obtained, and an unskillful surveyor is as apt to mislead as he is to give correct information.

The demurrer to the answer must be overruled, and the defendant is entitled to have the contract rescinded, unless His Honor in the court below shall, in the exercise of his discretion, allow the plaintiff to reply to the answer, etc. C. C. P., sec. 131. Let this be certified.

Judgment reversed.

Fraud applies to sales of both real and personal property. *May v. Loomis*, 140—p. 356; *Gatling v. Harrell*, 108—485. For a discussion of fraud growing out of words and acts, with numerous cases as illustrations, see opinion by Battle, J., in *March v. Wilson*, 44—143; *Gray v. Jenkins*, 151—80; *Stewart v. Realty Co.*, 159—230; *Pate v. Blades*, 163—267; *Dawe v. Morris*, 149 Mass., 188, 21 N. E., 313, 4 L. R. A., 158; *Pasley v. Freeman*, 3 T. R., 51, 12 E. R. C., 235; *Derry v. Peek*, 14 App. Cas., 337, 12 E. R. C., 250; 20 Cyc., 12; *Robertson v. Halton*, 156—215.

2. Nondisclosure or mere silence.

(130) *BROWN v. GRAY*,

51 N. C., 103, 72 A. D., 563—1858.

Action on the case for deceit in the sale of a slave. The plaintiff proved the sale by a bill of sale to him from the defendants. There was no evidence of what took place at the sale, except that it was by public auction. It was proved that the slave was unsound at the time of the sale, and that the defendants knew it.

The defendants' counsel contended that, admitting these facts, the plaintiff could not recover, for that, in order to charge the defendants he must prove either that the defendants at the time of the sale made fraudulent misrepresentations or resorted to some device, by which to conceal the unsoundness of the slave; and he prayed the court so to instruct the jury. The court refused to give the instructions prayed, but charged the jury, that upon the facts above stated, the plaintiff was entitled to recover. Verdict and judgment for the plaintiff, and appeal by the defendants.

PEARSON, C. J. In the sale of a chattel, the rule of our law is *caveat emptor*, and if the thing be unsound, to entitle the purchaser to maintain an action, he must prove, either a warranty of soundness, or a deceit.

In regard to deceit, the distinction is: where the unsoundness is *patent*, that is, such as may be discovered by the exercise of ordinary diligence, *mere silence*, on the part of the vendor, is not sufficient to establish the deceit, although he knows of the unsoundness, because *the thing speaks for itself*, and it is the folly of the purchaser not to attend to it. So that, in such a case he will not be heard to say, he was deceived, unless the vendor made a false statement, or resorted to some artifice, in order to prevent an examination, or to hide the unsoundness, so as to make the examination of no avail.

Where the unsoundness is *latent*, that is, such as could not be discovered by the exercise of ordinary diligence, *mere silence*, on the part of the vendor, is sufficient to establish the deceit, provided he knows of the unsoundness; for, as the thing is not what it appears to be, and diligence does not enable the purchaser to discover its unsoundness, he is deceived, unless the fact is disclosed; so that, in such a case, without what the law considers laches on the part of the purchaser, the deceit is accomplished by the *suppressio veri*.

The first proposition; that, in regard to a *patent* unsoundness, to make out a deceit there must be proof of the *scienter* and a *suggestio falsi*, is conceded on all hands.

The second, that in respect to a *latent* unsoundness, proof of the *scienter* and a *suppressio veri*, will be sufficient, we consider equally well settled, by the reason of the thing, and by the cases in our courts; Cobb v. Fogleman, 23 N. C., 440; Case v. Edney, 26 N. C., 93. The former was for a deceit in the sale of a female slave—who had a latent disease—cancer in the womb, but at the time of the sale was a *stout, vigorous-looking woman*. The defendant was silent in respect to her disease. The judge, in the court below, instructed the jury, that to entitle the plaintiff to recover, he must prove: 1st, that the unsoundness existed at the time

of the sale; 2d, that the defendant knew of, or had reason to believe its existence; 3d, but if these facts were proved, if the plaintiff also knew of the unsoundness, or had reason to believe it, he could not recover, and then instructed the jury, that there was no evidence on the last point. In this court the positions of law were approved, and, indeed, were not called in question, being taken by the profession as settled; and the decision was put not on, whether there was evidence on the last point, but on whether there was evidence of the *scienter* on the part of the defendant. The latter was for a deceit in the sale of a mare at auction by a trustee. The mare had a latent unsoundness, although on the day of sale *she appeared to be well*. The defendant, Marvill Edney, the maker of the trust, was "present at the sale, but took no part in it, and said nothing, one way or the other, as to the property." There was proof that he knew of the unsoundness. The evidence was contradictory as to the *scienter* on the part of the other defendant, the trustee. The judge, in the court below, held "that as the legal title had passed out of the defendant, Marvill, he was not accountable as an owner would be, who procured an auctioneer to cry his property, and stood by in silence." As to the other defendant, the court charged that, "although he acted as trustee in making the sale, yet, like all other persons who sold, he was bound to act honestly, and to *disclose defects* if he believed them to exist. It was then left to the jury, whether the mare was unsound, and whether the defendant knew it,—if so, *as he failed to state the circumstances*, he was liable in damages." In this court the positions of law, in reference to the deceit, were approved, but it was held that the defendant, Marvill Edney, although the legal title passed out of him, was liable for the deceit. In the conclusion of the opinion, the court say: "It will not be understood that we think the mere silence of a debtor, whose property is sold under execution, would amount to a fraud; for that is a proceeding *in invitum*; the sale is exclusively the act of the law."

Nothing could show more conclusively that this doctrine was considered as settled, both by our courts and the profession, than the manner in which it is treated in these cases; and after the elaborate argument of Mr. Boyden, we are satisfied that it is sustained by the weight of authority. The class of cases, *Mellish v. Matteux*, Peake N. P., 115; *Bagrehole v. Watters*, 3 Camp. Rep., 154; *Pickering v. Dawson*, 4 Taunton, 779, etc., where the property was sold "with all faults," is not in point. Nor the class of cases, *Laidlaw v. Organ*, 2 Wheat., 178; *Bench v. Sheldon*, 14 Barb., 66, etc., where *extrinsic circumstances*, affecting the price of the article exist, but in regard to which, *the means of intelligence are equally accessible to both parties*, such as the conclusion

of peace in 1815, between England and the United States, and the passages to be met with in some of the best writers, which seem to conflict, are all to be attributed to the fact, that the distinction between a patent and a latent unsoundness in the thing, was not kept in view. These questions of law present no difficulty, and from the manner in which the statement of the case is made up, upon the defendant's exception, the judgment must be affirmed.

The defendants' counsel contended, "that admitting that the slave was unsound, and that the defendant knew it, the plaintiff could not recover, for that, in order to charge the defendants, he must prove, either that they made fraudulent misrepresentations, or resorted to some device by which to conceal the unsoundness," and prayed the court so to instruct the jury.

This proposition is not true in its generality. If the unsoundness was patent it is true. If the unsoundness was latent it is not true. The case does not show whether it was patent or latent, and it follows that it was not error to refuse to give the instruction prayed for. In other words, it does not appear from the defendants' exception whether the court below erred or not; therefore, there is no ground upon which this court can reverse the judgment.

Judgment affirmed.

If a seller is aware of a defect and fraudulently conceals it, or it be such a defect as the buyer has no means of discovering by ordinary diligence, he is liable in an action for deceit. *Lunn v. Shermer*, 93—164. "With all faults" means those unknown to the vendor, or which the vendee can not readily discover; but the vendor can not make use of any artifice to prevent discovery. *Smith v. Andrews*, 30—3. *Caveat emptor* and patent defect. *Lawson v. Baer*, 52—461; *Whitmire v. Heath*, 155—304; *Bowman v. Bates*, 2 Bibb, 47, 4 A. D., 677.

If at execution sale the debtor remains silent, he is not guilty of fraud, for the property is sold as it stands, and *caveat emptor applies*; but if he makes false statements with regard to the property, he is guilty of fraud. *Erwin v. Greenlee*, 18—39. So if a sheriff says nothing about his levy of an execution on property, it is not fraud; but otherwise, if he does or says anything to create a false impression. *Wicker v. Worthy*, 51—500. Where a trustee sold land as a fee, but before making title discovered that it was only a life estate, failure to disclose this to the purchaser was fraud. *Alston v. Outerbridge*, 16—18. Where the purchaser knows there is a gold mine on a tract of land, he is not bound to disclose that fact to the vendor, but it is fraud if he is asked about it and fails to make it known. *Smith v. Beatty*, 37—456; *Harris v. Tyson*, 24 Pa. St., 347, 64 A. D., 661. Fraud in marriage. *Van Houten v. Morse*, 162 Mass., 414, 38 N. E., 705, 26 L. R. A., 430.

For further discussion of nondisclosure, see 2 Kent, 482-491; 14 Am. & Eng. Encyc., 66-84; Clark Cont., 221; 2 Pom. Eq. Jur., sec. 901; 20 Cyc., 15.

3. Material fact.

1. WHAT IS MATERIAL.

(131) GILMER v. HANKS,

84 N. C., 317—1881.

Civil action on a note. The defense was that its execution was obtained by false and fraudulent representations of the plaintiff's agent in regard to the consideration on which it was founded; that at a sale of the estate of G. W. Hanks (who had been adjudged a bankrupt in Virginia), by his assignee, one Jerry Gilmer, plaintiff's agent, represented to him that the plaintiff had recovered a judgment against the said bankrupt in the Superior Court of Surry, for about \$200, which was a lien upon his land, and had also proved the debt in the bankrupt court; and upon such representation induced the defendant to buy the said judgment and to give his note for \$175.

That before the note became due, he went to Surry County and there ascertained that there was no such judgment against the bankrupt, but only a note against him. The jury found that the note was not obtained by fraud, and that there was no failure of consideration. There was a judgment for the plaintiff, and the defendant appealed.

SMITH, C. J. (After discussing the admissibility of certain evidence.) The court charged the jury, that a docketed judgment in Surry could create no lien on land in Virginia; that a fraudulent representation to avoid a contract must be of a material matter resulting in damage, and that the proof of fraud must come from the party alleging it, and none had been offered to show the debt had not been proved in bankruptcy.

The exception is not pointed to any particular part of the instruction, as according to the practice it should, and is general in its reference. But we see no error in the charge and it is fully supported by the authorities.

The execution of the note being admitted, the evidence to impeach the validity must be produced by the defendant. *McLane v. Manning*, 60 N. C., 608. "All the authorities are uniform," says a late author, "in holding that in order to sustain an allegation of fraud by false representation, the representation must be of some matter or thing material to the contract or transaction sought to be avoided because of it." 3 *Wait's Act. & Def.*, 439. The rule deducible from adjudicated cases, he thus announces, "If the fraud be such that had it not been practiced, the contract would not have been made, or the transaction completed, then it

is material; but if it be shown or made probable that the same thing would have been done in the same way, if the fraud had not been practiced, it can not be deemed material." *Ibid.*, 440.

The judgment must be

Affirmed.

False representation as to the quantity of land may be ground for rescinding the contract, where quantity is material. *Hill v. Brower*, 76—124; *Atty.-Gen. v. Carver*, 34—231; *Earl v. Bryan*, 62—278; *Shell v. Roseman*, 155—90. Where the defendant is induced to subscribe for stock in a company upon the representation that H, in whom he had great confidence, was to be a large stockholder and manager; this was a material fact, and if misrepresented would amount to fraud. *Printing Co. v. McAden*, 131—178. Where one represents to an ignorant woman that a partition proceeding had been decided against her, and thereby obtains a deed from her at a very inadequate price, it will be set aside for fraud. *Stewart v. Hubbard*, 56—186.

As to materiality, see 14 *Am. & Eng. Encyc.*, 59-62, where it is said: "The question is not whether the person to whom the representation was made deemed it material, but whether it was in fact material." *Machine Co. v. Bullock*, 161—1; *Anderson v. Corporation*, 155—131; *Adams v. Gillig*, 199 *N. Y.*, 314, 92 *N. E.*, 670, 32 *L. R. A. (N. S.)*, 127, 20 *Ann. Cas.*, 913; *Hall v. Johnson*, 41 *Mich.*, 286, 2 *N. W.*, 55; *Kohl v. Taylor*, 62 *Wash.*, 678, 114 *Pac.*, 874, 35 *L. R. A. (N. S.)*, 176; *Mabardy v. McHugh*, 202 *Mass.*, 148, 88 *N. E.*, 894, 16 *Ann. Cas.*, 502; 20 *Cyc.*, 23.

2. MISREPRESENTING INTENTION.

(132) *HILL v. GETTYS*,

135 *N. C.*, 373, 47 *S. E.*, 449—1904.

This was an action to set aside a mortgage for fraud. Plaintiff's husband owed the defendant and two others debts which were secured by mortgage on his land, and the defendant's mortgage was subsequent to the others; the defendant told the plaintiff that if she would execute a mortgage on her land to secure his debt, he would take up and cancel the other two debts; the plaintiff executed the mortgage, the defendant bought the other debts and refused to cancel them. There was a judgment for the plaintiff, and defendant appealed.

Affirmed.

CONNOR, J. . . . A false and fraudulent representation or promise, we understand to be one made with the intention of the mind of the promisor not to perform the promise. This is the misrepresentation of a subsisting fact, false within the knowledge of the party making it and calculated to deceive. Speaking of an actionable fraud, Lord Bowen in *Edington v. Fitzminnia*, 29 *L. R. Chan. Div.*, 459, says: "There must be a misrepresentation of a subsisting fact; but the state of a man's mind is as much of a fact as the state of his digestion. It is true that it is difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. A mis-

statement as to the state of a man's mind is therefore a misstatement of a fact."

"The general rule in regard to promises is that they are without the domain of the law unless they create a contract, breach of which gives to the injured party simply a right of action for damages and not a right to treat the other party as guilty of a fraud. But that proceeds upon the ground that to fail to perform a promise is no indication that there was fraud in the transaction. There may, however, have been fraud in it; and this fraud may have consisted in making a promise with intent not to perform it. To profess an intent to do or not to do, when the party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made. A promise is a solemn affirmation of intention as a present fact." 1 Bigelow on Fraud, 484. (The author is discussing, of course, civil remedies.)

"When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense." Goodwin v. Horne, 60 N. H., 485.

"The intent is always a question for the jury, and to determine whether the intent was fraudulent, the jury have necessarily to look to the circumstances connected with the transaction or those immediately preceding or following it." Des Farges v. Pugh, 93 N. C., 31, 53 Am. Rep., 446.

We think that for the purpose of disposing of the motion for nonsuit, there was evidence proper to be submitted to the jury. They have found that the promise was false and fraudulent. In the absence of any exception to His Honor's charge, we must assume that he explained to them the distinction between the failure to perform a promise honestly made and one made with the purpose not to perform, which is a fraud upon the party relying upon it, as an inducement for his action. . . . Judgment affirmed.

It is the misrepresentation of intention as an existing fact, and not a mere intention as to a future purpose or act that constitutes the fraud. Clark Cont., 225; 14 Am. & Eng. Encyc., 47. To the same effect as the above case, see Des Farges v. Pugh, 93—31; Smith v. Young, 109—224; Blake v. Blackley, 109—257; Wilson v. White, 80—280; Troxler v. Building Co., 137—51; Edwards v. Culberson, 111—342 (where a woman obtained money from a man by promising to marry him); Rudisill v. Whitener, 146—403; Cerney v. Paxton & G. Co., 78 Neb., 134, 110 N. W., 882, 10 L. R. A. (N. S.), 640; Miller v. Sutliff, 241 Ill., 521, 89 N. E., 651, 24 L. R. A. (N. S.), 735; Gillespie v. Piles & Co., 178 Fed., 886, 44 L. R. A. (N. S.), 1; Sallies v. Johnson, 85 Conn., 77, 81 Atl., 974, Ann. Cas., 1913 A, 388; Donaldson v. Farwell, 93 U. S., 631.

3. OPINION.

(133) CASH REGISTER CO. v. TOWNSEND,

137 N. C., 652, 50 S. E., 306, 70 L. R. A., 349—1905.

Civil action to recover balance due on the price of a cash register; judgment for plaintiff for \$325, and plaintiff appealed.

BROWN, J. It is unnecessary to consider the fifty-three exceptions in the record. The plaintiff requested the court to charge that upon the whole evidence the plaintiff is entitled to recover of the defendant the sum of \$480. We are of opinion that such instruction should have been given, or rather that at the close of the evidence, with the admissions of the parties, such should have been the judgment of the court. It is admitted that the defendant purchased the cash register at the price of \$505, and that he paid \$25 on it; that the same was delivered to him, and there is no claim made of any defect in the mechanical construction of the machine. The defendant signed a written contract securing the purchase of the machine and stipulating the dates of payment. The defendant sets up an equitable defense, that the execution of the contract was induced by the false and fraudulent representations and deceit of the plaintiff's agent who sold him the machine, and asks for a rescission and cancellation of the contract. The burden of proof is therefore upon the defendant to establish such allegations by a preponderance of the evidence, and failing to do so, the plaintiff is entitled to judgment for the balance due upon the contract price.

The allegations relating to deceit and fraud in the answer charge that the agent of the plaintiff stated to the defendant that the use of the cash register would save the expense of a book-keeper; that the books could be kept upon the machine, and that it would not take half the time to keep the defendant's books as was required without a machine, and that it would save half of one clerk's time, and that the machine could be operated by a person of ordinary intelligence. We note that the answer fails to allege that such representations were not only false, but were known by the agent to be false, or, not knowing them to be true, he made them with a wrongful and fraudulent intent, or with reckless or wanton disregard of the truth. For such omission the court might well have rendered judgment upon the pleadings. But as the case was tried before the jury, we have considered it as if such necessary averments were in the answer.

The material elements of fraud, as laid down by the text-writers, are, first, misrepresentation or concealment; second, an intention to deceive, or negligence in uttering falsehoods with intent to in-

fluence the action of others; and third, the success of the deceit in influencing the action of the other party. To constitute legal fraud, which will warrant the rescission of a contract, there must be a false representation of a material fact. There are cases in the books where courts of equity have afforded relief from the consequences of innocent misrepresentation. Contracts induced thereby have, in some instances and under peculiar circumstances, been set aside; but in all the cases the misrepresentation was of a material and subsisting fact. No particular rule can be laid down as to what false representation will constitute fraud, as this must depend necessarily upon the facts of each case, the relative situation of the parties and their means of information. But all the authorities are to the effect that where the false representation is an expression of commendation or is simply a matter of opinion, the courts will not interfere to correct errors of judgment. *Walsh v. Hall*, 66 N. C., 236. The law will not give relief unless the misrepresentation be of a subsisting fact. *Hill v. Gettys*, 135 N. C., 375.

What has been called "promissory representation," looking to the future as to what the vendee can do with the property, how much he can make on it, and, in this case, how much he can save by the use of it, are on a par with false affirmations and opinions as to the value of property, and do not generally constitute legal fraud. *Benj. on Sales* (7 Ed.), 483, *et seq.*; *Godron v. Parmalee*, 2 Allen (Mass.), 212; *Long v. Woodman*, 58 Me., 52, and cases cited.

Mr. Clark in his work on Contracts states, in substance, that commendatory expressions or exaggerated statements as to value or prospects, or the like, as where a seller puffs up the value and quality of his goods, or holds out flattering prospects of gain, are not regarded as fraudulent in law. (Pp. 332-334.) It is the duty of the purchaser to investigate the value of such expressions of commendation. He can not safely rely upon them. If he does, he can not treat it as fraud either for the purpose of maintaining an action of deceit or for the purpose of rescinding a contract at law or in equity. *Saunders v. Hatterman*, 24 N. C., 32; 14 Am. & Eng. Enc., 34, and cases cited.

Mr. Kerr, in his work on Fraud and Mistake, at page 83, says: "A misrepresentation to be material should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion goes for nothing, though it may not be true, for a man is not justified in placing reliance on it."

Again, "A man who relies on such affirmation made by a person whose interest might so readily prompt him to invest the

property with exaggerated value, does so at his peril, and must take the consequences of his own imprudence."

The evidence relied on by the defendant is as deficient in proving the necessary elements of legal fraud as the answer is in alleging them. It tends to prove that Stronach, the plaintiff's agent, approached the defendant for the purpose of selling him a cash register; that he stated to the defendant that if he would use the cash register credit system he could do the same business with one clerk less or do away with a bookkeeper; that the defendant said if that was true he would take one; that defendant's brother had a cash register which looked like the one plaintiff sold defendant; that the next morning the defendant sent his bookkeeper to see his brother's machine and report upon it; that when he came back and reported, the defendant signed the contract and bought the machine. According to the defendant's own evidence, the machine worked all right, and it was only a question of the time it took the defendant's clerks to operate it. The defendant testified that he did not know that the machine had an adding attachment. He said: "The only objection I had to it was it took a little more time. I asked my brother, who had a cash register, about his, and he reported that the cash register is a good thing." The defendant further testified: "Neither I nor my clerks have ever had any experience with a machine of this kind. I knew nothing about one. Stronach told me that the trouble with the machine was that I had not sufficiently tried it. We used the cash register only one week. It took us about twice as long." The defendant's bookkeeper testified: "The machine was perfect from a mechanical standpoint. I can not say that it would take me twice as long with the machine as it would with the books. The more familiar I became with it, the faster I could work it. The more it was used, the better it would work. We did not use it over two weeks. I had never had any previous experience with cash registers." Another witness for the defendant said: "The cash part was all right. The credit part did not work well. If we had tried it longer, it might have worked better."

This evidence does not disclose any misrepresentation of a subsisting fact. The language of the agent at best was nothing more than "dealer's talk," commending his wares, and possibly exaggerating what the machine could do. There is no evidence of a fraudulent misrepresentation, or that the defendant acted entirely upon such representation; and there is no evidence that the agent knew such statements to be false when he made them. The evidence shows that the defendant undertook to investigate the truth and value of the agent's representations on his own account when he sent his bookkeeper to examine and inquire into the value of

his brother's machine, and did not sign the contract until his bookkeeper reported. There is no evidence to show that the value of this machine as a labor-saving device was peculiarly within the knowledge of the agent; that it was not known to other persons to whom the purchaser might have applied for information; that the agent did anything to prevent investigation on his part. Such evidence is regarded by some judges as material in cases of this kind. *Conley v. Coffin*, 115 N. C., 566. "When the purchaser undertakes to make an investigation of his own, and the seller does nothing to prevent this investigation from being as full as he chooses to make it, the purchaser can not afterwards allege that the vendor made misrepresentations." *Jennings v. Broughton*, 5 De Gex M. & G., 126; *Development Co. v. Silva*, 125 U. S., 259.

The evidence fails to show that the defendant has given the machine a fair trial. On the contrary, his own witnesses testified that the more they used it, the more expert they became. It is common knowledge and everyday experience that the wonderful products of mechanical skill, which in their operations almost approach human intelligence, require practice in order that the best results may be produced. It is possible that if the defendant and his clerks persevere in their efforts to master this machine, he may agree with his brother, that "the cash register is a good thing." But if it turns out that he has sustained loss, not from any mechanical defect in the machine, he must attribute it to his own negligence and indiscretion. He did not exercise that diligence in making inquiry which the law expects of a reasonable and careful person. *Vigilantibus et non dormientibus jura subveniunt*.

New trial.

"While expressions of opinion by a seller, amounting to more than mere commendation of his goods—puffing his wares, as it is sometimes called—or extravagant statements as to value or quality or prospects, are not, as a rule, to be regarded as fraudulent in law, yet when assurances of value are seriously made, and are intended and accepted and reasonably relied upon as statements of fact, inducing a contract, they may be so considered in determining whether there has been a fraud perpetrated; and though the declarations may be clothed in the form of opinions or estimates, when there is doubt as to whether they were intended and received as mere expressions of opinion or as statements of facts to be regarded as material, the question must be submitted to the jury." 14 A. & E., p. 35; 20 Cyc., p. 124; *Morse et al. v. Shaw*, 124 Mass., 59. *Unity Co. v. Ashcraft*, 155—63.

False affirmation of the value of land is not ground for relief, for it is only an opinion, and the plaintiff should inform himself, unless there is some fraud to prevent investigation. *Conley v. Coffin*, 115—563; *Setzer v. Wilson*, 26—p. 513; *Saunders v. Hatterman*, 24—32. In *May v. Loomis*, 140—350, the amount of timber on a tract of land was not given as an opinion but as a material fact; see also, *Cutler v. Lumber Co.*, 128—477; *Jones v. Ins. Co.*, 151—54; *Machine Co. v. Feezer*, 152—516; *Stewart v. Realty Co.*, 159—230; *Williamson v. Holt*, 147—515.

Representations as to another's financial condition may amount to fraud. *Thomas v. Wright*, 98—272. Misrepresentation of law is not fraud, unless

there is a relation of confidence between the parties. Clark Cont., 226; 14 Am. & Eng. Encyc., 54 *et seq.*

See generally, Harriman Cont., sec. 435; 20 Cyc., 19; 1 Page Cont., sec. 96; 35 L. R. A., 417; 14 Am. & Eng. Encyc., 343-347; Dalhoff Constr. Co. v. Block, 157 Fed. 227, 17 L. R. A. (N. S.), 419; Mt. Hope Nurseries Co. v. Jackson, 128 Pac., 250, 45 L. R. A. (N. S.), 243.

4. False within the knowledge of the party making it.

(134) FEREBEE v. GORDON,

35 N. C., 350—1852.

Action on the case for fraud in the sale of a slave. Plaintiff asked the defendant if the slave was sound, and defendant said he was so far as he knew; plaintiff then asked defendant if he would warrant the slave to be sound, and he said he would not, that plaintiff must take him as he had done; it appeared that defendant had purchased the slave two days before at auction, unwarranted as to soundness. There was some evidence that defendant knew the slave was not sound.

The court charged, that if the defendant stated that the slave was sound so far as he knew, and that was false within his own knowledge, he was responsible. There was a verdict and judgment for the plaintiff, and defendant appealed.

NASH, J. The charge of His Honor was entirely correct. When an article of personal property is sold with all faults, the doctrine of *caveat emptor* certainly applies. The very object of introducing such a stipulation into the contract is to put the buyer upon his guard, and throw upon him the burden of examining the article and guarding himself against all faults, as well those which are secret as those which are apparent. But the rule never was adopted to encourage fraud and deceit or false dealing between man and man. The principles of the common law are based on morality—not an abstract or ideal morality, but one encouraging and enforcing free dealing between man and man. When, therefore, in a contract of sale the vendor affirms that which he either knows to be false or does not know to be true, whereby the other party sustains a loss, and he acquires a gain, he is guilty of a fraud, for which he is answerable in damages. When, therefore, sued for a deceit in the sale of an article, he can not protect himself from responsibility by showing that the vendee purchased with all faults—if it appear that he resorted to any contrivance or artifice to hide the defect of the article or made a false representation at the time of the sale. The fraud may exist either in using means to conceal the defect or in a false representation of the condition of the article. The case we are considering states that there was evidence tending to show the unsoundness of the negro at the

time of the sale, and of the defendant's knowledge of the fact; and it shows also the assertion of the defendant that he was sound so far as he knew. The questions, both of unsoundness and the *scienter*, were left by His Honor to the jury, with the direction that if the statement made by the defendant, as to the soundness, "was false within his knowledge, he was responsible for it as a false and fraudulent representation." We concur in this opinion, and it is sustained fully by the case of *Schneider v. Heath*, 3 Camp., 505. The words of Chief Justice *Mansfield* are strongly applicable to this case. In the commencement of his opinion he remarks: "The words are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale, these words will not protect him. There might be such fraud, either in a false representation or in using means to conceal some defect." See, also, 2 Steph. N. P., 1283; *Millish v. Matteux*, Pea. N. P. Cases, 156.

No error is perceived in His Honor's charge, and the judgment is
Affirmed.

(135) *WHITEHURST v. LIFE INSURANCE CO.*,

149 N. C., 273, 62 S. E., 1067—1908.

The plaintiff held a life insurance policy, which contained a provision that at the end of ten years he could "surrender the policy and draw the entire cash value, that is, the legal reserve, and four percent interest." The plaintiff could not read the policy, and the defendant's agent read it to him and told him that at the end of ten years the whole amount paid in would be returned with interest; the plaintiff accepted the policy upon this statement. There was a judgment for the plaintiff for \$359, and defendant appealed.

Affirmed.

HOKE, J. . . . It is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity. *Modlin v. R. R.*, 145 N. C., 218; *Ramsey v. Wallace*, 100 N. C., 75; *Cooper v. Schlesinger*,

111 U. S., 148; Pollock on Torts (7 Ed.), 276; Smith on the Law of Fraud, sec. 3; Kerr on Fraud and Mistake, 68.

The conditions under which these misrepresentations as to material facts in the course of a bargain may be made the basis of an action for deceit, as a general proposition, will be found very well stated in Pollock, *supra*, as follows:

"To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur: (a) It is untrue in fact; (b) the person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not; (c) it is made with the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it; (d) the plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage."

And as to responsibility for these statements attaching, when the parties are not upon equal terms in reference to them, it is said in . . . Kerr on Fraud and Mistake, page 68:

"A misrepresentation, however, is a fraud at law, although made innocently, and with an honest belief in its truth, if it be made by a man who ought in the due discharge of his duty to have known the truth, or who formerly knew, and ought to have remembered, the fact which negatives the representation, and be made under such circumstances or in such a way as to induce a reasonable man to believe that it was true, and was meant to be acted on, and has been acted on by him, accordingly, to his prejudice. If a duty is cast upon a man to know the truth, and he makes a representation in such a way as to induce a reasonable man to believe that it is true, and is meant to be acted on, he can not be heard to say, if the representation proves to be untrue, that he believed it to be true, and made the misstatement through mistake, or ignorance, or forgetfulness."

Applying the principle announced and sustained by these authorities, we are of opinion, as stated, that the motion to nonsuit, entered by defendant, was properly overruled. The policy held by plaintiff in defendant's company contained stipulations to some extent ambiguous and certainly indefinite; and when an agent of defendant company, in the effort to induce plaintiff to take out the policy, said to him that, under one of these stipulations, "the company at the end of ten years would pay back the premiums with interest," we think that, under the conditions attending the transaction, and having due regard to the respective positions of the parties, it was a question for the jury as to whether these assur-

ances, given by defendant's agent, were intended as statements of fact, accepted and reasonably relied upon by plaintiff as a material inducement to the contract, and that the verdict establishes an actionable fraud, imputable to defendant company, entitling plaintiff to recover the premiums paid and interest.

There is no error, and the judgment below is Affirmed.

The party making a representation, must know or believe it to be false, or what is the same thing, have no reason to believe it to be true. Silence, as to a fact which a party does not believe to exist, can not be said to be a fraudulent concealment. *Hamrick v. Hogg*, 12—350. There must be knowledge or belief in the existence of the defect. *Cobb v. Fogleman*, 23—440. When the vendor has been informed of the defect but does not believe it to exist, he is not bound to disclose it. *McEntire v. McEntire*, 43—297; *Gerkins v. Williams*, 48—11; *Ramsey v. Wallace*, 100—75. When one represents another to be solvent, knowing him to be otherwise, it is fraud. *Thomas v. Wright*, 98—272. When bank officers make false statements as to the condition of the bank, and thereby induce depositors to keep their funds in the bank, they are guilty of fraud, and are conclusively presumed to know the condition of the bank. *Tate v. Bates*, 118—p. 308; *Solomon v. Bates*, 118—311. Where A refers the purchaser to B for information, and B misrepresents it, the contract is voidable by the purchaser. *Pettijohn v. Williams*, 46—145. Where there is a warranty, the liability does not depend upon the scienter. *McKinnon v. McIntosh*, 98—89; *Modlin v. R. R.*, 145—218; *Whitmire v. Heath*, 155—304; *Tarault v. Seip*, 158—363; *Hodges v. Smith*, 158—256, 159—525; *Robertson v. Halton*, 156—215; *Fields v. Brown*, 160—295.

See also 1 Page Cont., sec. 108; *Harriman Cont.*, sec. 442; *Clark Cont.*, 229; 20 Cyc., 24; 6 L. R. A., 149; 28 L. R. A., 753; 29 L. R. A., 360; 14 Am. & Eng. Encyc., 86—102; *Chatham Furnace Co. v. Moffatt*, 147 Mass., 403, 18 N. E., 168, Mord. & McL. Rem., 695; *Shackett v. Bickford*, 74 N. H., 57, 65 Atl., 252, 7 L. R. A. (N. S.), 646; *Pasley v. Freeman*, 3 T. R., 51, 12 E. R. C., 235; *Derry v. Peek*, 14 App. Cas., 337, 12 E. R. C., 250. In *Aldrich v. Scribner*, 154 Mich., 23, 117 N. W., 581, 18 L. R. A. (N. S.), 379, it is held that a false representation is sufficient whether the person knew it or not.

5. Representation must be reasonably relied upon.

(136) BLACKNALL v. ROWLAND and COOPER,

108 N. C., 554, 13 S. E., 191—1891.

Civil action for damages for false and fraudulent representations, by the defendants, in a contract by which the plaintiff was induced to convey a valuable tract of land for certain shares of stock in a corporation. There was a written contract in which, among other things, it was stated, "As the basis of the proposition and acceptance it is represented and understood that said stock is of the par value of \$50, etc. (giving amount paid in, dividend declared out of net profits, indebtedness and assets). This trade is conditioned upon the representations above as to condition of business and stock of said company and other statements being verified upon examination of its affairs by an expert bookkeeper of Blacknall's selection and at his expense." The defendants denied

the fraud. The plaintiff introduced the writing and other evidence, and the court held that the plaintiff could not recover because he had failed to have the examination made. The plaintiff submitted to a nonsuit and appealed.

MERRIMON, C. J. The cause of action alleged in the complaint consists, in substance, of the alleged false and fraudulent representations of the defendants made to the plaintiff in the paper-writing, mentioned above, and otherwise as to the condition, circumstances and solvency of the corporation therein named, which the plaintiff reasonably believed to be true, and whereby he was fraudulently misled and induced to buy the shares of stock mentioned of the defendants in that corporation, which were really of no value, and to convey to them his tract of land mentioned of large value; and further, of the false and fraudulent warranty of the truth of such representations made by the defendants to the plaintiff as additional inducement to him to buy such stock of no value.

There was evidence for the plaintiff, on the trial, tending to prove that the representations made by the defendant to him in the paper-writing and otherwise were not true; that the corporation was insolvent; that it was not prosperous, but declining; that its indebtedness was greater and its resources less than represented; that the dividend mentioned was not declared out of the earnings of the corporation, and that the defendants knew these facts; that they encouraged and induced the plaintiff to believe these representations and to close the proposed transaction. There was evidence for the defendants tending to prove the contrary.

In this state of the case the presiding Judge said "that, as the plaintiff had not had the books of the corporation examined by an expert bookkeeper, he would instruct the jury that the plaintiff was not entitled to recover." In this there was error. The plaintiff was not concluded by the fact that he did not have such examination made. He was not bound to verify the representations made; he might, as a matter of caution, have done so, but he might not unreasonably believe, rely and act upon the plain, pertinent and material statements made by the defendants to him in the paper-writing and otherwise. If the plaintiff believed them to be true, and acted upon them, and the defendants knew them to be false, and intended fraudulently thereby to induce the plaintiff to purchase their shares of stock, of no value, at the price he paid for them, he might recover, notwithstanding he did not cautiously have their representations verified. Such verification was not intended for the benefit of the defendants; much less was it intended to shield or relieve them from liability for fraud and deceit they might perpetrate upon the plaintiff. The paper-writing, and par-

ticularly the last clause of it in respect to the verification of its statements, might, taken in connection with other evidence favorable to the defendants, be evidence of their good faith and going to prove that the plaintiff did not rely upon their representations; but, on the other hand, the same might, along with other evidence favorable to the plaintiff, be evidence of a fraudulent contrivance to deceive and mislead him. Fraud is protean in its devices and endless in its shifts and subterfuges. What is evidence of it, or its absence, oftentimes depends more or less upon the condition of matters and things material and the attending circumstances. In one aspect of the evidence in this case, accepted as true, the material representations in the paper-writing in effect made to the plaintiff, and other like representations otherwise made to him by the defendants, were grossly false and so within their knowledge. And it might be fairly inferred, from the nature of the matter and the evidence, that the paper-writing, and particularly the last clause of it, was an artful shift to mislead and deceive the plaintiff, a man little familiar with such matters, as to the sincerity and good faith of the defendants in respect to the proposed sale of the shares of stock mentioned. In another aspect of it more favorable to the defendants, the paper-writing, and especially the last clause of it, would be evidence tending to show their good faith, and that the plaintiff, in buying the shares of stock and the sale of his land, relied upon his own judgment and information gathered from other sources than the defendants. If the defendants knew that the representations made by them in the paper-writing and otherwise, as in evidence, were false—as the evidence, much of it, tended to prove—it would be most unreasonable to infer that they intended or expected the same to be verified or scrutinized. On the other hand, in view of parts of the evidence, the reasonable and just inference would be that the last clause of the paper-writing was inserted to simulate great fairness and candor on the part of the defendants, and thus the more successfully entrap, deceive and mislead the plaintiff, a man, as the evidence tended to show, not familiar with such matters. Such view of the evidence would be strengthened by the fact that the verification suggested was to be made by an expert bookkeeper, at the expense of the plaintiff. Shrewd men of experience might think and expect that a man of small experience, after such flattering representations, would not have such verification made at his own cost.

Hence, the paper-writing, including the last clause of it, was simply evidence. It did not conclude the plaintiff, as the court intimated it did.

There is, therefore, error. The judgment of nonsuit must be

set aside and the case disposed of according to law. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Error.

The same case was again before the court in 116—389, and the words in the contract were held to amount to a warranty, and bound the defendants.

If the means of information are equally within the reach of both parties, the rule *caveat emptor* applies, and the purchaser must protect himself. *Fields v. Rouse*, 48—72; but this maxim does not apply where there is actual fraud. *Hill v. Brower*, 76—124; or artifice is used to prevent detection. *Riggs v. Perkins*, 75—397. See also, *Crowder v. Langdon*, 38—476; *Duckworth v. Walker*, 46—507; *Hobbs v. Riddick*, 50—80; *School Com. v. Kesler*, 67—443; *Grantham v. Kennedy*, 91—153; *Anderson v. Rainey*, 100—321; *Smathers v. Gilmer*, 126—757. Recent decisions and text-writers show a strong tendency to hold that the defense of negligence is not open to the defendant, when sued for his positive fraud. *Griffin v. Lumber Co.*, 140—p. 521; *May v. Loomis*, 140—p. 357; *Gray v. Jenkins*, 151—80; *Leonard v. Power Co.*, 155—10; *Shell v. Roseman*, 155—90; *Helms v. Holton*, 152—587; *Machine Co. v. Bullock*, 161—1; *Machine Co. v. McKay*, 161—584; *Fargo Gaslight Co. v. Fargo Elec. Co.*, 4 N. D., 219, 37 L. R. A., 593 (subject note); *Pigott v. Graham*, 48 Wash., 349, 93 Pac., 435, 14 L. R. A. (N. S.), 1176; *Cottrill v. Krum*, 100 Mo., 397, 18 A. S. R., 549; *Dody v. Condit*, 163 Ill., 511, 45 N. E., 224. If the plaintiff knows or believes the defect to exist, he can not recover for fraud. *Cobb v. Fogleman*, 23—440; and if a prudent person, by ordinary care in prosecuting his inquiries, would have ascertained the truth, before acting, relief will be refused on the ground of negligence. *Boyden v. Clark*, 109—669; *Black v. Black*, 110—398; *Dellinger v. Gillespie*, 118—737. In sales of land the vendee should protect himself against defects, and if he fails to do so, it is his loss, except in case of fraud. *Etheridge v. Vernoy*, 70—713; *Foy v. Haughton*, 85—168; *Anderson v. Rainey*, 100—321; *Woodbury v. Evans*, 122—779; *Smathers v. Gilmer*, 126—757; *Conley v. Coffin*, 115—563; *Saunderson v. Hatterman*, 24—35; *Farrar v. Alston*, 12—69. In *Lytle v. Bird*, 48—122, and *Credle v. Swindell*, 63—305, it was held to be negligence in the vendee not to have a survey, but these have not been followed. *Walsh v. Hall*, *supra*.

See above, Intention and Opinion. *Clark Cont.*, 228; 14 Am. & Eng. Encyc., 115—137; 1 Page Cont., sec. 117 *et seq.*; 20 Cyc., 62.

6. Intended to deceive and does deceive and injure.

(137) STAFFORD v. NEWSOM,

31 N. C., 507—1849.

Civil action for damages. Plaintiff bought six bushels of corn from defendant; after the price had been agreed on, and while they were measuring the corn or immediately after it was measured, the defendant or his clerk remarked that arsenic had been placed in two plates in the room, to kill rats; the plaintiff said he did not like to take the corn if it had been exposed to arsenic; the defendant said there was no danger, that he had sent some of the corn to mill, and that he would be responsible for all damages; the plaintiff took the corn, fed it to his horses, and they died.

The court charged the jury, that to entitle the plaintiff to re-

cover, he must show that the corn was infected with arsenic ; that defendant knew it and concealed it ; that plaintiff's horses died by eating it ; that if the defendant or his clerk told the plaintiff about the arsenic before the contract was completed, so as to put him on inquiry, he could not recover ; but if told after the contract was completed and the title vested in the plaintiff, it would not avail defendant ; or if what defendant said was calculated to put plaintiff on his guard, that it would excuse defendant.

There was a verdict and judgment for the plaintiff for the value of the horses, and the defendant appealed.

NASH, J. The first portion of His Honor's charge is free from exception. To entitle plaintiff to recover it was necessary for him to show that the corn was poisoned with arsenic ; that the defendant knew it and concealed it, and that he was injured thereby. And it is correct, as charged, that if defendant or his clerk told the plaintiff that the corn had been exposed to the influence of arsenic, so as to put him on inquiry, before the contract was completed, the plaintiff could not recover. So far all is correct. We do not concur with His Honor in the subsequent part of his charge. He proceeds, "But if such information were given after the property in the corn vested in the plaintiff, it would not avail." We think in this there was error. The plaintiff claimed damages to the amount of the value of three horses, which, it was alleged, had been poisoned by eating the corn, and had died. Upon the supposition that a special action on the case can be maintained for the loss of the horses, the important inquiry, in this case, was as to the amount of damages. If the seller makes a fraudulent representation of an article, yet the purchaser can not maintain an action for deceit, if at the time of the contract, or before, he knows the fact to be otherwise than as represented. So in this case, if, at the time the plaintiff fed his horses with the corn, he knew or had been informed, it was poisoned with arsenic, although that information came to him after the contract was made he can not maintain an action for their loss ; because it was his folly to make the experiment, after obtaining the information. The plaintiff, then, was entitled to damages, if the defendant had cheated him, only for the value of the corn, and not for that of the horses, for either before or after the contract was closed, and before the corn was used by him, he was apprised of the fact.

We think there was error also in the closing part of the charge. The jury were instructed that if what the defendant said to the plaintiff about the arsenic was calculated to put him off his guard, rather than excite to inquiry, then the talk about the arsenic would not avail the defendant. The action for deceit rests in the intention with which a representation is made, or a fact not mentioned.

It was not sufficient that the representation made should be *calculated* to mislead—for that may be done by the most honest communication—but the representation must be made with intent to deceive. Moral turpitude is necessary to charge a defendant in an action for a deceit. *Hamrick v. Hogg*, 12 N. C., 350.

Per Curiam. Judgment is reversed, and a *venire de novo* ordered.

"Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, there an action lieth." *March v. Wilson*, 4—143; *Weaver v. Wallace*, 9 N. J. L., 251, Mord. & McL. Rem., 700. Where the defendant is ignorant of a fact, and there is no intent to deceive, mere silence is not fraud. *Tilghman v. West*, 43—183. Where the complaint alleging false representation does not allege that the plaintiff was thereby deceived, it is defective. *Foy v. Haughton*, 83—467; same case, 85—168. The intent to deceive need not apply to a particular person, if it exists and is acted on with injury. *Tate v. Bates*, 118—p. 308; *Solomon v. Bates*, 118—311; *March v. Wilson*, 44—143; *Cheatham v. Hawkins*, 80—161; *Henry v. Dennis*, 95 Me., 24, 49 Atl., 58, 85 A. S. R., 365. The loss of a good bargain is not sufficient damage, *Fagan v. Newsom*, 12—20; but what may be recovered as damages, see *Lunn v. Shermer*, 93—164; *Robertson v. Halton*, 156—215; *Hodges v. Smith*, 159—525; *French v. Vining*, 102 Mass., 132, 3 A. R., 440; *Jeffrey v. Bigelow*, 13 Wend., 518, 28 A. D., 476; *Wells v. Cook*, 16 Ohio St., 67, 88 A. D., 436.

See also *Clark Cont.*, 230-233; 14 Am. & Eng. Encyc., 102-106; *Ibid.*, 106-115; *Ibid.*, 137-147; 20 Cyc., 42.

Fraud in auction sales.—Free and fair competition being essential to every auction sale, any means, such as false representations or descriptions, agreements to stifle competition, or to run up the price, would be fraud. *Smith v. Greenlee*, 13—126; *Morehead v. Hunt*, 16—35; *Woods v. Hall*, 16—415; *McDowell v. Simms*, 41—278; 45—130; *Bailey v. Morgan*, 44—351; *Tomlinson v. Savage*, 41—430; *Whitaker v. Bond*, 63—290; *Black v. Bayliss*, 86—527; *Davis v. Keen*, 142—496; *Satterfield v. Kindley*, 144—455; *Henderson-Snyder Co. v. Polk*, 149—104.

7. Fraud in the factum, and fraud in the treaty.

(138) McARTHUR v. JOHNSON,

61 N. C., 317, 93 A. D., 593—1867.

Action of trespass *quare clausum fregit*. Both parties claimed under John L. McArthur. In 1853 John L. McArthur contracted to sell a tract of fifty acres of land to the defendant. On the next day, being on his way to the Southwest, after some discussion as to the best way of making the conveyance, A. L. McArthur, an older brother of John, suggested that one McCallum, who lived on the road, should write a power of attorney to one McLean to make the deed in John's absence. At McCallum's, John remained in the buggy, and A. L. went into the house; after some time he returned with McCallum, bringing a deed, and in reply to a question by John, said it was "all right." John, without reading the deed, or having it read, signed it and went on his journey. This deed not only included the fifty acres, but a twenty-acre tract (the

land in controversy), and authorized McLean to convey the latter to A. L. McArthur. This was done without the knowledge or consent of John. By subsequent conveyances the plaintiff claimed the twenty acres. The defendant contended that the deed was void on account of the fraud practiced.

There was a verdict and judgment for the defendant and plaintiff appealed.

BATTLE, J. The decision of this case depends upon the question whether the fraud alleged to have been practiced upon John L. McArthur, in the execution of the power of attorney to McLean, under whom the plaintiff claims, was a fraud in the *factum* of the deed, or a fraud in the consideration of it, or in some matter collateral to it. It is a well-established distinction that, for a fraud of the first kind, the deed may be avoided at law, while for a fraud of either of the two last kinds, relief can be had only in a court of equity. *Reed v. Moore*, 25 N. C., 310; *Canoy v. Troutman*, 29 N. C., 155; *Gant v. Hunsucker*, 34 N. C., 254; *Nichols v. Holmes*, 46 N. C., 360; *Gwynn v. Hodge*, 49 N. C., 168; *Logan v. Simmons*, 18 N. C., 13.

An instance of fraud in the *factum* is when the grantor intends to execute a certain deed, and another is surreptitiously substituted in the place of it. See *Gant v. Hunsucker* and *Nichols v. Holmes*, *ubi supra*. Another instance is afforded by the case of a deed executed by a blind or illiterate person, when it has been read falsely to him upon his request to have it read. 2 Blk. Com., 304; *Manser's case*, 2 Coke Rep., 3. These authorities show that the party was fraudulently made to sign, seal and deliver a different instrument from that which he intended, so that it could not be said to be his deed. Several of the cases in our Reports, referred to above, furnish examples of what is meant by fraud in the consideration of the deed, or in the false representation of some matter or thing collateral to it. In all of them it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty, or some fraudulent representation or pretense. In this category is included the case of a man who can read the instrument which he signs, seals and delivers, but refuses or neglects to do so. Such a man is bound by the deed at law, though a court of equity may give relief against it. In support of this position the authority of *Shepherd's Touchstone* is directly in point: "If the party that is to seal the deed can read himself, and doth not, or, being an illiterate or blind man, doth not require to hear the deed read, or the contents thereof declared; in these cases, albeit the deed be contrary to his mind, yet it is good and unavoidable at law; but

equity may correct mistakes, frauds," etc. See 1 Shep. Touch., 56 (30 Law Lib., 121).

While coming to the conclusion that the deed in the case now before us is not one which can be avoided at law we are aware that a different decision was made in the case of McKerrall v. Cheek, 9 N. C., 343. There a sheriff's deed conveyed 300 acres of land, but it having been proved that he intended to convey only 120, and would not have executed the deed, had not the courses, of which he was ignorant, been inserted in such a way as to deceive him as to the quantity, it was held that the deed was not conclusive, and that the question ought to have been left to the jury to say whether it was fraudulently obtained; for, of the question of fraud, a court of law had cognizance as well as a court of equity. The case was decided without argument, and no authorities are referred to in support of the opinion of the court. What is more material in lessening the authority of the case, not a word is said about the distinction between fraud in the *factum* of the deed and fraud in the consideration, or in some matter collateral to the deed. That distinction and the reasons upon which it is founded, in assigning one kind of fraud to the jurisdiction of a court of law, and another to that of a court of equity, seems to have been first noticed and explained in this State in the case of Logan v. Simmons, 18 N. C., 13. In that case these remarks are found: "The counsel for the plaintiff, however, insisted upon the general observation, that upon questions of fraud, the jurisdiction of courts of law and equity is concurrent. In its generality that position is inaccurate. As to many and most cases it is true; but there are numerous frauds which can be alleged, investigated and relieved against in equity only. Where a conveyance is not avoided by statute, and where the objection is grounded upon imposition in the treaty, and not upon undue and unlawful means for obtaining the execution—the *factum*, of the particular instrument, relief in equity is most appropriate, and generally can be had there only. A court of equity can do complete justice in such cases by holding the instrument to be a security for what was advanced upon the treaty or done under the contract, while a court of law would be in danger of doing wrong to one of the parties, at all events, by being obliged to pronounce the whole conclusively void or valid, for all purposes." McKerrall v. Cheek, *ubi supra*, affords an instance of what would be the hardship and injustice of allowing the conveyances to be avoided at law; the sheriff's deed would not have conveyed even what the parties intended to convey; and thus innocent persons claiming under him would have been defeated of their just rights; while in a court of equity the instrument would have been avoided only as to the part of the land fraudulently in-

served in it. At all events, the court of equity would not have avoided it *in toto*, but would have so moulded it as to do exact justice between the respective parties. For these reasons, we are of opinion that the decision in *McKerall v. Cheek* can not be sustained, and that His Honor in the court below erred in following that case, instead of the principle of the more recent decisions of this court. The judgment must be reversed, and a *venire de novo* awarded.

To the same effect is *Devereux v. Burgwyn*, 33—490; *Hyman v. Moore*, 48—416; *Hill v. Whitfield*, 48—p. 123. Under the present practice the same distinction exists, but the remedy in both cases is in one court. *Devereux v. McMahon*, 108—p. 147; *Medlin v. Buford*, 115—260; *Dixon v. Trust Co.*, 115—274; *Cutler v. Lumber Co.*, 128—477; *Dorsett v. Mfg. Co.*, 131—p. 259; *Griffin v. Lumber Co.*, 140—p. 519; *Hayes v. R. R.*, 143—p. 129. If the grantor is illiterate and demands to have the deed read to him, and it is read falsely, it is fraud in *factum*; but if he does not ask to have it read, or asks to have it read and there is no refusal but only a failure to do so, and he signs it, there is no fraud. *School Com. v. Kesler*, 67—p. 448.

For other instances, see *Douglas v. Matting*, 29 Iowa, 498, 4 A. R., 238; *Gibbs v. Linabury*, 22 Mich., 479, 7 A. R., 675; *Walker v. Egbert*, 29 Wis., 194, 9 A. R., 548; *Bedell v. Herring*, 77 Cal., 572, 11 A. S. R., 307; *Thorougood's case*, 2 Co. Rep., 9, 6 E. R. C., 202; *Foster v. Mackinnon* (1869), L. R., 4, C. P., 704; 6 R. C. L., 632.

8. Effect upon the rights of the parties.

(139) *FIELDS v. BROWN*,

160 N. C., 295, 76 S. E., 8—1912.

This was an action to recover possession of a mule which the plaintiff had exchanged with the defendant for a bay mare, and for damages for deceit and false warranty. It was alleged that the defendant represented the mare to be sound and all right, good to work, gentle for driving, etc., and that these representations were false, and deceived the plaintiff to his injury. There was a judgment of nonsuit against the plaintiff, and he appealed.

WALKER, J. . . . The plaintiff elected, as he had the right to do, to sue for the mule, upon the ground that the fraud avoided the contract of exchange, and, therefore, that he is entitled to be restored to its possession and to have judgment for any resulting or consequential damages he has sustained by the deceit and false warranty. *Pritchard v. Smith*, 160 N. C., 79. A person who has been fraudulently induced to enter into a contract has the choice of several remedies. He may repudiate the contract, and, tendering back what he has received under it, may recover what he has parted with or its value; or he may affirm the contract, keeping whatever property or advantage he has derived under it, and may recover in an action of deceit the damages caused by the fraud.

While this affirmance may preclude him from rescinding the contract, it does not prevent his maintaining an action of deceit. Moreover, if sued upon the contract, he may set up the fraud as a defense, or as a basis of a claim for damages by way of recoupment or counterclaim. And in a proper case the defrauded party may be entitled to the equitable remedies of rescission and cancellation or reformation. As a general rule, however, the defrauded party can not both rescind and maintain an action of deceit. If he elects to rescind the contract, he may recover what he has parted with under it, but can not recover damages for the fraud. The latter rule, as applied to a perfect rescission of the contract, is based, not alone upon the principle that the party has elected his remedy, but also on the fact that he has sustained no damage. 20 Cyc., 87, 88, 89, and notes. This rule, of course, is bottomed upon the theory that he has suffered no loss that will not be fully repaired by the return to him of what he has given up. If, however, a perfected rescission does not place the injured party in *statu quo*, as where he has suffered damage which the rescission and the remedies based thereon can not repair, there is no principle of law which prevents him from thereafter maintaining an action of deceit, and in such cases a recovery has uniformly been allowed. 20 Cyc., 89, and notes, citing *Faris v. Lewis*, 2 B. Mon. (Ky.), 375; *Lenox v. Fuller*, 39 Mich., 268; *Warren v. Cole*, 15 Mich., 261; 1 Bigelow on Fraud, 67. So an action for deceit in the making of false representations inducing plaintiff to sell goods to defendant has been held not necessarily inconsistent with a previous action of replevin to recover the goods. *Lenox v. Fuller*, 39 Mich., 268; *Welch v. Seligman*, 72 Hun (N. Y.), 138, 25 N. Y. Sup., 363. See, also, *Dean v. Yates*, 22 Ohio St., 388; 20 Cyc., 89, note. Since the defrauded party to the contract has the right to affirm it, retain its benefits, and also recover damages for the fraud, he may sue to enforce his rights under the contract and at the same time maintain an action for deceit. Where a person by the practice of fraud obtains money from another under such circumstances that he has no right to retain it, the defrauded party may waive the tort and recover the money in an action for money had and received, upon the theory of an implied promise to pay it. A return or an offer to return what plaintiff has received under the contract induced by the fraud is not a condition precedent to his maintaining an action of deceit (if he does not disaffirm), since he is entitled to the benefit of his contract plus the damage caused by the fraud. 20 Cyc., 90, 91, and notes. See, also, *May v. Loomis*, 140 N. C., 350. (The court also holds that the action should have been sustained upon the false warranty.)

Judgment reversed.

At law, the injured party may affirm the contract and sue for damages, or repudiate the contract and recover what he has parted with. *Joyner v. Early*, 139—49; *Wilson v. White*, 80—280; *Wallace v. Cohen*, 111—103; *Knight v. Houghtalling*, 85—p. 30; *Ransom v. Shuler*, 43—304; *Webb v. Fulchire*, 25—485; *Blake v. Blackley*, 109—262; *Des Farges v. Pugh*, 93—31; *May v. Loomis*, 140—350; *Caldwell v. Ins. Co.*, 140—100. He may also resist an action by the other party and set up fraud as a defense. *May v. Loomis*, 140—350; *Wilson v. Hughes*, 94—182. The form of action for fraud or false warranty may be either in tort or contract. *Bullinger v. Marshall*, 70—520; *Ashe v. Gray*, 88—190; 90—137; *Harvey v. Hambright*, 98—446; *Hobbs v. Bland*, 124—284. The action for deceit or fraud requires the scienter, while the warranty does not. 124—284; *Lassiter v. Ward*, 33—443; *Blanton v. Wall*, 49—532; *Chamberlain v. Robertson*, 52—12; *Smith v. Newberry*, 140—385; *Food Co. v. Elliott*, 151—393; *Stewart v. Realty Co.*, 159—230; *Hodges v. Smith*, 159—525; *Mord. & McRem.*, 704, 706.

In equity, the injured party may repudiate the contract and ask for rescission and cancellation of the instrument, or he may resist a suit for specific performance; but he must act promptly after discovering the fraud, must act decidedly, must rescind or affirm in toto, and generally upon rescission place the other party in *statu quo*. *May v. Loomis*, 140—350; *Knight v. Houghtalling*, 85—17; *Alexander v. Utley*, 42—242; *Moore v. Reed*, 37—580; *Caldwell v. Stirewalt*, 100—201; *Davis v. Ely*, 104—16.

For statute of limitations, see *Clark's Code*, sec. 155 (9), and cases cited; *Hooker v. Worthington*, 134—283; *Banner v. Stotesbury*, 139—3.

9. Rights of third persons.

(140) VASS v. RIDDICK,

89 N. C., 6—1883.

Civil action on a promissory note. Judgment for the plaintiff, and the defendant appealed.

ASHE, J. On the trial, it was conceded that when Riddick signed the note the names of Leroy G. Bagley and W. H. Bagley were on the note, and that he signed the same believing the name of W. H. Bagley to be genuine. It was admitted that on or about the date of the note, and after Riddick had signed it, Leroy G. Bagley took it to the plaintiff, who, believing the signatures of all the signers of the note to be genuine, loaned the amount of the note, less one year's interest, and that no part of the same had been paid.

After the verdict was rendered, the question of the liability of the defendant upon the verdict and admissions above set forth, was argued before the court, and the court being of opinion with the plaintiff, rendered judgment in his favor.

The record fails to state the grounds taken by the defendant's counsel in the court below, but we presume it was the same that was urged in this court, viz., that the name of W. H. Bagley having been forged, and the defendant seeing his name to the note and believing it was genuine, and that he was good for the amount, was induced to sign it, and by reason of the fraud and imposition

thus practiced upon him by Leroy G. Bagley, he was discharged from liability on the note, and judgment ought not to be rendered against him upon the finding of the jury.

Such a defense could not have availed the defendant, if it had been taken on the trial; for under our law all bills, bonds and promissory notes are joint and several, and an action may be brought against one or more of the parties thereto, at the option of the plaintiff. C. C. P., sec. 63. And when bonds and notes are thus several as well as joint, in the absence of any reservation or condition at the time of the delivery of the instrument, the obligors or makers are separately bound; and the obligation assumed by each is the same as upon an independent contract. *City of Sacramento v. Dunlap*, 14 Cal., 421. Hence it is held, that if a bond (and there is no difference in this respect between a bond and a promissory note) be signed and delivered without any condition or reservation annexed, although it may appear to have been contemplated by the parties that it should be signed by others, it is the deed of the obligor and will be binding on him, although the others do not sign. *Haskins v. Lombard*, 10 Maine, 140; *Barnes v. Lewis*, 73 N. C., 138; *Scott v. Whipple*, 5 Greenl., 336; *State v. Peck*, 53 Maine, 284. And even where there is a condition or reservation imposed at the time of delivery, if it is stipulated with the principal obligor or maker, and the payee or obligee has no knowledge of it, the maker or obligor will be bound. As in *Gwyn v. Patterson*, 72 N. C., 189, where it was held, "that one who signed a covenant as surety, upon the condition and agreement between him and his principal that it is not to be binding upon him or delivered to the covenantee, unless another person should sign it as surety, is bound thereby, although the principal to whom he entrusted it delivered it to the covenantee without a compliance with such condition, of which, and its breach, the latter has had no notice." So in *Bigelow v. Comegys*, 5 Ohio, 256, which was an action brought upon a replevin bond that was required by statute to be executed with two sureties; it was held it was not void because actually signed and delivered by the party with one surety only, the name of another person appearing on the bond, as surety, being a forgery. The principle upon which it was decided was, that an obligor who has signed a bond can not avoid his liability by showing that he was induced to execute the bond by the fraud of one of the co-obligors, in which the obligee had no participation whatever. To the same effect is *Barnes v. Lewis*, *supra*; and also *Anderson v. Warren*, 71 Ill., 20, which, like the case at bar, was an action upon a promissory note, and it was sought by one of the makers to avoid payment on the ground the note was obtained by the fraud and circumvention of a co-maker, which was not partic-

ipated in by the payee; and it was held that his rights could not be affected by any fraud practiced between the makers of the note.

The doctrine established by these cases is founded upon the settled rule, that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss; for it is against reason that an innocent party should suffer for the negligent conduct of another.

The facts in the case before us bring it directly within the application of the principle enunciated in the cited cases. Riddick was the maker with Leroy G. Bagley, who forged the name of W. H. Bagley, and Vass the payee. The loss must fall upon one or the other. The plaintiff was the innocent payee of the note. He had no knowledge of the fraud practiced upon the defendant by Leroy G. Bagley; but the defendant was guilty of negligence in not informing himself of the genuineness of the signature of W. H. Bagley before signing the note and he must therefore bear the loss.

There is no error. The judgment of the Superior Court is

Affirmed.

See also *Wallace v. Cohen*, 111—103; *Sprinkle v. Welborn*, 140—163; *R. R. v. Kitchen*, 91—39; *Bank v. Burgwyn*, 108—62; *Medlin v. Buford*, 115—260.

10. Constructive fraud.

(141) LEE and others v. PEARCE and wife,

68 N. C., 76—1873.

Civil action for land. The plaintiffs claim under the will of Mary A. Lindsay; the defendants claim under a deed executed by Mary A. Lindsay to the *feme* defendant; the plaintiffs allege that this deed was obtained by fraud, in that the defendant was the confidential agent of the grantor, and induced her to sign the deed when she intended to execute a will; defendants denied the allegations of fraud; there was evidence that the grantor spoke of the deed as her will, that the defendants were frequently at her house, and the defendant, Pearce, acted as her agent in buying wood, etc. The person who wrote the deed testified that he read it over to the grantor, and she was satisfied with it.

The plaintiffs asked the court to charge the jury that if Pearce was the confidential agent of the grantor, the deed was void without other evidence of fraud. The court declined this, and instructed the jury that if Pearce was the confidential agent, as a steward in England, or in the relation of attorney and client, so that he was implicitly trusted and looked to for advice, it was a strong badge of fraud, if he procured a conveyance of property

for his own benefit, as to his wife, and with other evidence might justify a finding of fraud; but the proof must be clear and satisfactory.

PEARSON, C. J. "The innocence of a party who has profited by a fraud will not entitle him to retain the fruit of another man's misconduct, or exempt him from the duty of restitution." *Adams Equity*, 176. So the case may be relieved from complication, by the fact that the deed is made to Mrs. Pearce, and may be treated as if it had been made to Pearce, to whom the fraud is imputed.

The provision in our present constitution, by which the distinction between actions at law and suits in equity is abolished, and the subsequent legislation affects only the mode of procedure, and leaves the principles of law and equity intact. The courts as now constituted, give relief, not merely to the extent and in the cases where it was heretofore given by the courts of law, but also to the extent and in the cases where it was heretofore given by courts of equity; in other words, the principles of both systems are preserved, the only change being, that these principles are applied and acted on in one court and in one mode of procedure. For illustration, under the old system, if there was fraud in the *factum*, *i. e.*, when one paper is substituted for another, or when the party executes a paper through actual fear of death, or great bodily harm, the instrument is void, never was the deed of the party, and is treated in a court of law as a nullity. This was the extent to which courts of law, by reason of their peremptory judgments and regard for deeds, gave relief.

But courts of equity can mould and shape decrees so as to mete out exact justice between the parties, and regard deeds merely as a high species of evidence, and for these reasons give relief beyond the point at which courts of law stopped. So when there was no fraud in the *factum*, and no physical duress, a court of equity would take the case in hand and give fitting relief if the execution of the deed be procured by fraud or moral duress; if a bond, by having it canceled; if a conveyance, by a decree, treating the deed as having passed the legal title, and converting the party into a trustee who is ordered to reconvey upon such terms as conscience requires. Under the present system the same court gives relief in all of these cases, and the judgment is framed to suit the case. C. C. P., 216, "a judgment is the final determination of the rights of the parties in an action." The equities of the parties being involved in this final determination, as well as their legal rights, it follows that the court must now give such judgment as will determine these equities and legal rights, in such manner as has heretofore been according to the course of the courts respectively: for example, a *cestui que trust* conveys to his trustee at an

inadequate price; the decree would have been, that the trustee reconvey on repayment, subject to an account for the profits. The judgment now is, that the plaintiff recover the land and damages and have a reconveyance on repayment of the price received, whether a consideration has been paid or the conveyance be a mere act of bounty. Owing to our registration laws, the judgment for land should direct a reconveyance to make the title appear on the register's books.

As ancillary to the jurisdiction, to avoid deeds obtained by fraud, undue influence or moral duress, courts of equity established the doctrine that in certain fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted. The doctrine rests on the idea not that there *is* fraud, but that there *may* be fraud, and gives an artificial effect to the relation, beyond its natural tendency to produce belief. It may be harsh to presume fraud, and to take it for granted that every man dealing with one who is in his power, acts the rascal, unless he is able to prove to the contrary, which it is hard to do; but the doctrine was adopted from motives of public policy, to prevent fraud as well as to redress it, and to discourage all dealings between parties standing in these fiduciary relations. It may be said with truth, that it is in most cases, as difficult for one in the power of another, to prove the many acts and contrivances by which he has been taken advantage of, as it is for the other party to prove a negative; so there is no sufficient reason for not enforcing a doctrine, by which all dealing between the parties is discountenanced—both bargains and bounties.

In the case before us, the instruction asks for the application of this doctrine. The learned Judge refused to give the instruction, but assuming a certain intimate relation to be proved, left the allegation of fraud, as an open question of fact for the jury, treating the relation of the parties simply as an important link in the chain of evidence. [The court then explains that this presumption is a principle of equity, and not merely a rule of evidence.]

This imposes upon us the duty of marking distinctly the dividing line between fiduciary relations, which raise the presumption of fraud, as a matter of law, and relations which raise a presumption of fraud as a matter of fact; the duty is made especially important by the change in the tribunal for the trial of issues of fact. [The court here explains the method of procedure in courts of equity in regard to this presumption.]

Adams, a writer of remarkable clearness, uses this expression in treating of the principles on which dealings between persons holding fiduciary relations, are set aside in equity, when the only relation is that of friendly habits, etc. "But no rigorous definition can be laid down so as to distinguish precisely between the effects of natural and often unavoidable kindness, and those of undue influence or undue advantage." Adams Eq., 185. Every rule of law must be "rigorous," that is, fixed and definite, and must "distinguish precisely." Certainty is the very essence of a rule of law. So these words are only appropriate to presumptions of fact. . . .

A presumption of law can not be graduated by degrees of force. The relation relied on to raise a presumption as a matter of law, must of itself and without other evidence, either be sufficient for the purpose or not sufficient; if it be sufficient, the law raises the presumption and that ends the matter, unless the presumption be rebutted; if the relation be not sufficient, the instant you let it go and reach out for other matter to aid in proving the fact alleged, it ceases to be a presumption of law, and becomes a presumption of fact, to pass for what it is worth, and no more, and the tribunal trying the issues of fact, may consider it as having a slight or strong tendency to produce belief, according to which its degree of force will be graduated. (The court then discusses the different kinds of presumptions.)

After a full consideration of the authorities and "the reason of the thing," we are of opinion, that only "the known and definite fiduciary relations," by which one person is put in the power of another, are sufficient under our present judiciary system to raise a presumption of fraud, as a matter of law to be laid down by the Judge, as decisive of the issue unless rebutted.

For instances, and by way of illustration: 1. Trustee and *cestui que trust* dealing in reference to the trust fund. 2. Attorney and client, in respect to the matter wherein the relationship exists. 3. Guardian and ward, just after the ward arrives at age. 4. When one is the general agent of another and has entire management, so as to be in effect, as much his guardian as the regularly appointed guardian of an infant. There may be other instances. Fiduciary relations that do not fall under the first class, raise a presumption of fraud as a matter of fact to pass before the jury for what it may be worth. For instance: 1. Family physicians; 2. A minister of religion; 3. Parent and child; 4. When the only relation is that of friendly intercourse and habitual reliance for advice and assistance, and occasional employment in matters of business as agent.

Our case would seem, from what appears by the statement sent, to come under this instance; for there is no evidence that Pearce

was the general agent of Mrs. Lindsay, entrusted with the management of all of her affairs of business, although he was looked up to by her and relied on for advice and assistance, and frequently acted as her agent in buying wood and leasing her property; all of which evidence should be passed upon by a jury, as raising a presumption of fraud or undue influence and as being a link in a chain of circumstantial evidence. . . .

From the exposition of the subject, that I have taken the pains to make, it appears, in certain known and fiduciary relations, the chancellors, according to the mode of trial in courts of equity, made a presumption of fraud as a matter of law; in other relations, the chancellors made a presumption of fact, which, with other evidence, might create belief of fraud.

According to the evidence sent to us, there is nothing to show that Pearce was the general agent of Mrs. Lindsay, having charge of all of her affairs, like a guardian in respect to his ward.

So the instruction asked for was properly refused; but His Honor assumes that there may have been such a general agency, and upon that supposition gives to the relation the effect of a strong badge of fraud, which with other evidence [might show fraud], treating it as an open question of fact. Under this condition of things, we feel it to be our duty, to order a second trial, upon issues to be agreed on by the counsel, or settled by the court in pursuance of the rule fixed by this court.

But apart from this, the plaintiff is entitled to a *venire de novo*, for error in the charge in this: His Honor, after instructing the jury, that fraud must be proved (which is true except when from certain relations fraud is presumed as a matter of law) and after explaining the *onus probandi*, tells the jury that to justify a verdict finding fraud, they must be satisfied "beyond a reasonable doubt."

It is very questionable whether this formula, which has been acted upon in the trial of capital cases, has answered any useful purpose; but it has never been extended to civil actions. There the rule is, if the evidence creates in the mind of the jury a belief that the allegation is true, they should so find.

Per Curiam.

Venire de novo.

See also *Smith v. Moore*, 142—p. 295; *Sprinkle v. Wellborn*, 140—163; *Mauney v. Redwine*, 119—534; *Brown v. Mitchell*, 102—p. 368; *McLeod v. Bullard*, 84—515.

Confidential relations as shown in other cases: *Mortgagor and mortgagee*, *Jennings v. Hinton*, 128—214; *Hines v. Outlaw*, 121—51; *Hall v. Lewis*, 118—509; *Jones v. Pullen*, 115—471; *Dawkins v. Patterson*, 87—384; *Tillery v. Wrenn*, 86—217; *Whitehead v. Hellen*, 78—99; *McLeod v. Bullard*, 84—515. Guardian and ward, *Williams v. Powell*, 36—460; *McLarty v. Broom*, 67—311; *Johnston v. Haynes*, 68—509; *Harris v. Carstarphen*, 69—416; *Batts v. Winstead*, 77—238. Principal and agent, *Buffalow v. Buffalow*, 22—241; *Mullins v. McCandless*, 57—425; *Franklin*

v. Redman, 58—420; Oldham v. Oldham, 58—89; Hartley v. Estis, 62—167. Executor or administrator and next of kin, Baxter v. Costin, 45—262; Cole v. Stokes, 113—270. Director or officer of a corporation, Hill v. Lumber Co., 113—173. Husband and wife, Howard v. Early, 126—170; McRae v. Battle, 69—98; but not in case of suitor and fiancé, Atkins v. Withers, 94—581. Parent and child, where the superior position is presumed to control, Wessel v. Rathjohn, 89—p. 383. For other cases in which the rule has been applied, see Tuttle v. Tuttle, 146—484; Smith v. Moore, 149—185; Edwards v. Supply Co., 150—171; Bellamy v. Andrews, 151—256; King v. R. R., 157—44; Pritchard v. Smith, 160—79; Alford v. Moore, 161—382; Huguenin v. Basely, 14 Ves., 273, 6 E. R. C., 834, 3 Wh. & T. L. Cas., 95 (463); Bisph. Eq., sec. 233.

Fraud on marital rights.—Where a person about to be married, makes a voluntary conveyance of his or her property, without the knowledge of the intended husband or wife, it is a fraud upon the marital rights, and the deed may be set aside. Logan v. Simons, 38—487; Tisdale v. Bailey, 41—358; Strong v. Menzies, 41—544; Taylor v. Richman, 45—278; Spencer v. Spencer, 56—404; Poston v. Gillespie, 58—258; Brinkley v. Brinkley, 128—503; but an innocent purchaser would be protected, Brinkley v. Spruill, 130—46; Bisph. Eq., sec. 253.

Trustee dealing with trust property.—At law a sale by a trustee to himself is a nullity, but a deed made to a third person with agreement to reconvey, passes the legal title; but it may be avoided in equity, not because there is, but because there may be fraud. Froneberger v. Lewis, 79—426; Gibson v. Barbour, 100—p. 197; Rigden v. Jones, 8—p. 504; Gorden v. Finley, 10—p. 242; Boyd v. Hawkins, 17—p. 207; Hunt v. Bass, 17—292; Haskins v. Wilson, 20—385; Ford v. Blount, 25—516; Brothers v. Brothers, 42—150; McLeod v. McCall, 48—87; Robinson v. Clark, 52—562; Patton v. Thompson, 55—285; Elliott v. Pool, 56—17; West v. Sloan, 56—102; Pitt v. Petway, 34—69; Roberts v. Roberts, 65—27; Stilly v. Rice, 67—178; Whitehead v. Hellen, 76—99; Joyner v. Farmer, 78—196; Taylor v. Heggie, 83—244; Stradley v. King, 84—635; Dawkins v. Patterson, 87—384; Bruner v. Threadgill, 88—361; Howell v. Tyler, 91—p. 214; Sumner v. Sessoms, 94—p. 375; Tayloe v. Tayloe, 108—p. 73; Whitehead v. Whitehurst, 108—458; Averitt v. Elliott, 109—560; Cole v. Stokes, 113—270; Jones v. Pullen, 115—p. 471; Russell v. Roberts, 121—322.

Attorney appearing on both sides, the judgment is voidable. Moore v. Gidney, 75—p. 40; Molyneux v. Huey, 81—p. 113; Gooch v. Peebles, 105—411; Arrington v. Arrington, 116—170; Cotton Mills v. Cotton Mills, 116—p. 652.

Fraudulent conveyances under statutes 13th and 27th Eliz. (Revisal, secs. 960, 961) are valid *inter partes*, but may be set aside for creditors or subsequent purchasers.

For constructive fraud generally, see 1 Page Cont., 176; Bispham's Equity, secs. 230 to 239.

Sec. 4. Duress.

1. By imprisonment.

(142) MEADOWS v. SMITH,

42 N. C., 7—1850.

PEARSON, J. The plaintiff alleges that he is a poor, ignorant old man, seventy-five years of age, and he never had a lawsuit before in his life. In January, 1848, the defendant issued a writ against him and his son and one Davis, in a case for conspiracy, laying the damage at \$500. The officer, one Wells, came to his

house about midnight and arrested him; and, after exciting his fears by telling him that the lawyer who issued the writ said he would do well to compromise by giving his note for \$300, and by telling him that if it went to court the State would take it up and ruin him, and for the second offense would hang him, advised him, as a friend, that he had better go to the house of the defendant and settle, and said he thought he could get him off for \$100. After being in custody until morning, he concluded to go to the defendant and buy his peace. The officer took him to the defendant's house, some twelve miles distant. He was not at home, and the plaintiff, after remaining under arrest all day, his alarm and apprehension being increased by the combined artifice of the wife of the defendant and the officer, agreed, if he could be discharged, to execute a note to the defendant for \$100, and pay the officer \$13, which was accordingly done, and he was liberated. The plaintiff further alleges that the defendant had no cause of action against him whatever; that the alleged ground of complaint was, that his son, who had been summoned as a witness, in the case of the State for Farmer and wife and others against one McLure, on his bond as clerk and master, had failed to attend at October Term, 1845, in consequence of which the case was continued; and the charge was, that his son had stayed away, by a conspiracy between the plaintiff, his son and Davis. The plaintiff admits that his son did not attend at that term, but avers that he attended before and afterwards, and his testimony was in no wise material, and he was subsequently discharged by the defendant from attendance, and the case was decided by arbitrators, before whom his son was not examined.

The plaintiff further alleges that he had no agency in keeping his son from attending court, and no wish to do so; that he had no interest, connection or concern with the suit, and knew not that the defendant had any; that the defendant was not a party of record, and the plaintiff had no knowledge nor belief that he was beneficially interested. The plaintiff avers that one year after he had recovered before the arbitrators the defendant issued the writ, without cause and for the mere purpose of taking advantage of him, and had, by the falsehood and artifice of his agent and co-adjutor, the officer who served the writ, taken advantage of his ignorance and fears, and extorted from him the note of \$100, upon which the defendant has since taken judgment and is about to issue execution. The prayer is for a perpetual injunction.

The defendant denies that there was any concert between him and the officer, to take advantage of the plaintiff and extort the note from him. He says that, believing the plaintiff had entered into a conspiracy to keep his son from attending court, whereby

he was greatly injured, he directed his attorney to issue the writ, left home and did not return, until after the case was compromised and the note executed, when he received it and intended to collect it. He does not state the grounds of his belief as to the alleged conspiracy, nor aver the materiality of the testimony of the plaintiff's son, nor assign any motive why he should wish him not to attend, and gives no color to the charge of conspiracy; nor does he show any damage, except he thinks he had to pay the cost of the term for a continuance. He admits, however, that it does not so appear on the record, and he admits he recovered before the arbitrators, without the testimony of the plaintiff's son; but he says that, though not a party of record, he was beneficially interested; and complains that the award was only for \$175, when more was due, but he does not aver that the result would have been different, if the plaintiff's son had been examined, or that he desired to examine him. He says, "That as to the age and ignorance of the plaintiff, your respondent knows but little, and as to his poverty, that is immaterial." "He believes his wife and son and brother compromised the case in his absence, because she was desirous of keeping your respondent out of litigation." He does not believe they resorted to any artifice or fraud to alarm the plaintiff, who compromised willingly, not because he was in fear, but because he knew himself to be guilty. He further says the officer was not authorized to act as his friend in effecting the compromise, "nor was he authorized, by any undue or false and extravagant language, to endeavor to coerce the plaintiff into a compromise. Whatever of false or nonsensical matter the said deputy sheriff conveyed to the plaintiff, your respondent claims that he is in no wise responsible for, even if the facts were true; and that the officer was barely authorized to make known to the defendants in that suit the terms, upon which they could have the suit compromised; for this defendant, so far from combining with the officer, was not even friendly towards him and had no confidence in him. At what hour of the day or the night the deputy sheriff served the writ, your respondent is ignorant."

In the language of the court in the case of *Heath v. Cobb*, 17 N. C., 191, the plaintiff "was under duress, in the eye of a court of equity. He was not in a condition to be dealt with; he could not and did not stand on his rights." No one can believe that the plaintiff executed the note for the purpose of making compensation for an injury done to the defendant. On the contrary, everyone, who hears the bill and answer read over, is convinced that he executed it to relieve himself from the state of alarm and embarrassment in which he was involved.

The equity of the bill rests upon three allegations: The plaintiff

was a poor, ignorant old man, who had never had a lawsuit in his life. The defendant, without probable cause, issued a writ against him for a conspiracy—damages \$500. The plaintiff, being arrested and having his fears excited by the falsehood and artifice of the defendant's agent, executed the note to relieve himself.

The answer does not meet this equity. "As to the age and ignorance of the plaintiff, your respondent knows but little;" and "his poverty is immaterial." Can this be called a full and fair answer to the first allegation?

He says, he honestly believed the plaintiff was guilty of a conspiracy; but he sets out no ground for his belief, and leaves the mind at a loss, even to conjecture, why he should have taken up such an idea. A witness, in an unimportant suit upon the bond of a clerk and master, fails to attend at one term, having attended punctually before and after, until discharged. The plaintiff, his father, has no interest or concern in the case, nor did he know that the defendant had; and this forms the basis of a grave charge of conspiracy.

As to the third allegation, the defendant says, "he is ignorant at what hour of the night or day the defendant made the arrest;" but he positively denies that he was authorized to coerce a compromise, by exciting the fears of the plaintiff, and claims not to be responsible, if such was the fact. The officer was the agent of the defendant in executing the writ, and it is admitted that he was authorized to make known to the plaintiff the terms upon which the suit could be compromised. Such being the case, it was as little as the defendant could have done to make inquiry as to the truth of the allegations, made in respect to the conduct of his agent, before he adopted his act, by receiving the note and attempting to collect it, and especially before he swore to the answer, and then to have stated his belief. His neglect to do so raises an inference against him. In fact, he admits the allegation, but claims not to be responsible for the unauthorized acts of the officer. Upon this point of morals the defendant is clearly in error. It is as much against conscience to attempt to avail oneself of the iniquity of an agent, after it is known, as if there had been preconcert. There is but a slight shade of distinction between the guilt of one who receives goods, knowing them to be stolen, and of him who procures the theft to be committed. We think the answer is unfair and evasive. It is error to dissolve the injunction, and it ought to have been continued to the hearing, because the equity of the bill is not met.

Perhaps, when the case is heard, the proof may show that the defendant had good cause of action. If so, it may be proper to adopt the course taken in *Heath v. Cobb*, and, instead of making

the injunction perpetual, the court may be induced to hold up the judgment, as a security for any damages the defendant may be able to recover in an action at law; and, to this end, to remove the impediments to such action growing out of the compromise and the statute of limitation. But we presume it will require a strong case to justify such a course, when the damage is trifling, and "the play is not worth the candle." It is clear that the defendant can not conscientiously touch one cent of the plaintiff's money, until he has established his damages by an action at law. And we can not help feeling that the conduct of the plaintiff's wife, in her laudable wish "to keep him out of litigation," would have been more praiseworthy, if she had let the old man go home, without giving his note.

This opinion will be certified to the court below, and the defendant will pay the costs of this court.

A person in jail, charged with larceny, confessed judgment for the value of the property, for the purpose of conciliating the prosecutor and the court; such judgment can not be sustained on account of duress, but it may be security for the damages to be recovered in a civil action for the trespass. *Heath v. Cobb*, 17—187. Unless it appear that process has been used to force the person into a contract, it will be presumed to be regular and valid. *Gunter v. Thomas*, 36—199; but in an action based on abuse of process, it makes no difference whether there was probable cause or not, since the action lies even if the process is issued for a just cause, is valid in form, and was proper in its inception. *Jackson v. Telegraph Co.*, 139—p. 356. If one, knowing that he has no claim against another, sues out legal process against him and seizes his person or property, and the defendant, acting upon the false representation of the plaintiff, and not being able at the time by reasonable diligence to know or prove that such representations are false, pays the demand, he may recover it in a subsequent action. *Adams v. Reeves*, 68—p. 138. Under the former rule, the imprisonment must have been illegal; but now it is generally held to be duress, (1) where there is an arrest for an improper purpose, without just cause; (2) where there is arrest without lawful authority, whether for just cause or not; (3) where there is an arrest for a just cause, but for an unlawful purpose, even though under proper process. 10 *Am. & Eng. Encyc.*, 321, 322, and notes; *Clark Cont.*, 242; *Fairbanks v. Snow*, 145 *Mass.*, 153, 1 *A. S. R.*, 446; *Hatter v. Greenlee*, 1 *Porter (Ala.)*, 222, 26 *A. D.*, 370; *Fillman v. Ryon*, 168 *Pa. St.*, 484, 32 *Atl.*, 89; 9 *Cyc.*, 443; 14 *Cyc.*, 1123.

2. By threats.

(143) EDWARDS v. BOWDEN,

107 N. C., 58, 12 S. E., 58—1890.

Civil action to foreclose a mortgage on the land of the *feme* defendant. The defendant in her answer alleged that the mortgage was obtained by fraud and collusion of the plaintiffs, and threats and compulsion of her husband.

The court charged the jury that "if they believed that at the time the *feme* defendant executed the mortgage sued on, she was

sick in bed, that her husband had threatened to leave her if she did not execute the mortgage, that she had two children and was dependent upon her husband for support, and that she believed he would execute his threat; that the plaintiff told her that if she did not execute the mortgage he would sell the chattels of her husband, on which he had a mortgage, and prosecute him and put him in jail for failing to convey certain real estate, which he agreed to convey to them to get advances; and that the *feme* defendant being induced by the threats of her husband and the plaintiff, and on account of her sickness, executed the mortgage, this would be duress, and they would find for the defendant."

There was a verdict and judgment for the defendant, and plaintiff appealed.

SHEPHERD, J. By duress, in its more extended sense, is meant "that degree of severity, either threatened or impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness." 2 Greenleaf Ev., sec. 301.

Bacon, in his Abridgment, vol. 2, p. 156, referring to Lord Coke, says, "that for menaces, in four instances, a man may avoid his own act. 1. For fear of loss of life; 2. Of loss of member; 3. Of mayhem; 4. Of imprisonment." The threat of imprisonment "may be to the person of the party or of the party's husband, wife, parent or child, through constraint of which he—in form—consents to what he otherwise would not." Bishop Cont., sec. 715. Though several modern authorities have been very liberal in the application of this doctrine, we think that a wise public policy requires that contracts solemnly entered into by deed, should not be avoided, except upon the most imperative demands of necessity and justice, and we can not, therefore, sanction the principle of some of the decisions, that a mere threat of unlawful imprisonment, standing alone, will be sufficient to avoid a deed. There should be some process issued or some steps taken towards the execution of the threat, or, at least, some circumstances attending it which would produce a reasonable apprehension of imminent arrest or imprisonment. In the case of *Ware v. Nesbit*, 94 N. C., 664, the husband had been actually arrested and bailed, and the wife was present and "greatly excited." Afterwards the sureties of the husband threatened to surrender him and "send him back to jail" unless the debt was compromised. The wife knew of this, and under the influence of this threat executed the deed.

No instructions were asked, says the court, to the effect that the evidence was insufficient to sustain the alleged duress, and the ruling was based only upon the exceptions to the instructions given to the jury. The decision leaves us in some doubt whether the court would have held that the evidence was sufficient had the point

been properly presented. Assuming, however, that the testimony was sufficient, the case is distinguishable from the present, in that the husband had actually been arrested, and was, it seems, in imminent danger of a new imprisonment by reason of his being surrendered by his bail. Thus much we have been careful to say, in order to exclude the idea that we think that the simple threat of the plaintiff in this case, was, in itself, sufficient to constitute technical duress. Neither would the threat to foreclose the mortgage upon the husband's chattel property have that effect; nor do we think that the threat of abandonment made by a husband would, under ordinary circumstances, amount to such duress.

We are of opinion, however, that while neither of these grounds would, in itself, be sufficient to warrant a finding of technical duress, yet when they are taken together, and in connection with the important facts that the wife was prostrated by sickness, and that her privy examination was taken at once and while she was in that condition, there was sufficient testimony to be submitted to the jury in support of the allegation of fraud and compulsion which is set up in the answer. Especially is this so, when the court made the establishment of all of these circumstances necessary to an affirmative finding, by charging the jury that "if she (the defendant) was induced [to execute the deed] by the said threats of her husband and the said plaintiff, and on account of her sickness," they should find in her favor.

The argument here proceeded almost entirely upon the ground of legal duress, but we think that, taking all of the alleged facts to be true, a case would be made out which would call for the equitable intervention of the court. "In equity there is no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction. . . . The question to be decided in each case is whether the party was a free and voluntary agent. Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property which, having regard to the age, capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment." Pollock Cont., 524. "Where there is no coercion amounting to duress, but a transaction is the result of a moral, social or domestic force exerted upon a party controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work

upon in the condition or circumstances of the person influenced, which renders him peculiarly susceptible and yielding; his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like." Pom. Eq., Jur., 951.

It is true that where duress alone is relied upon, equity follows the law (2 Pom. Eq., 950), but there is something more in this case. We have a woman on a bed of sickness; we have the confidential relation of husband and wife, and the presumed influence of the husband over her. Pom. Eq. Jur., sec. 963; Bisp. Eq., sec. 237. We have also (*Huguenin v. Basely*, 2 White & Tudor's L. C., 1156, notes) the husband threatening to abandon her and their two children, who were dependent upon him for support, and this in connection with the threats of unlawful prosecution and imprisonment of the husband. These combined circumstances bring the case within the principle stated by Pollock and Pomeroy, *supra*, and also by 2 Greenleaf on Ev., sec. 301, *supra*, who says that facts which in themselves do not amount to technical duress are "admissible in evidence to make out a defense of fraud and extortion in obtaining the instrument." It is upon this ground that we rest our decision. Affirmed.

"Duress *per minas* exists when a person is induced to perform an act to avoid a threatened and impending calamity." 10 Am. & Eng. Encyc., 324. The quotation in the beginning of the opinion above states the common law rule of "a man of ordinary firmness," but the decision seems to adopt the more modern rule of the effect upon the mind in each particular case. See 10 Am. & Eng. Encyc., 324-328, and notes; Clark Cont., 241; *Galusha v. Sherman*, 105 Wis., 263, 81 N. W., 495, 47 L. R. A., 417; *Sulzner v. Cappeau-Lemley & Miller Co.*, 234 Pa., 162, 83 Atl., 103, 39 L. R. A. (N. S.), 421.

Where the plaintiff received Confederate money on a debt because the Judge threatened to put him in jail and send him to Richmond, if he refused, it was duress. *Harshaw v. Dobson*, 64—384; 67—203. The declarations or threats of the obligor in this respect would not be sufficient. *Wells v. Shuler*, 70—55; *Simmons v. Mann*, 92—12; nor would hostile public opinion, or unpopularity be sufficient. *Sudderth v. McCombs*, 79—398. While duress was originally limited to the person, it has been extended to apply to the relation of husband and wife, parent and child, and to property. 10 Am. & Eng. Encyc., 328 *et seq.*; *Sykes v. Thompson*, 160—384; *Shattuck v. Watson*, 53 Ark., 147, 13 S. W., 516, 7 L. R. A., 551; *Cribbs v. Sowle*, 87 Mich., 166, 24 A. S. R., 166; *Mayor of Balt. v. Lefferman*, 4 Gill, 425, 45 A. D., 145; *Eadie v. Slimmon*, 26 N. Y., 9, 82 A. D., 395; *Adams v. Irving Nat. Bk.*, 116 N. Y., 606, 15 A. S. R., 447; *Williams v. Bayley*, L. R., 1 H. L., 200, 6 E. R. C., 455.

Effect of duress is to render the contract voidable, as in the cases given above; but where the force is such as to deprive the party of all volition for the time, it may be void. Pollock Cont., 553. A deed obtained by duress is voidable, but the injured party must proceed within a reasonable time after the force has ceased to operate. *Reed v. Exum*, 84—430. In the case of *Edwards v. Bowden*, *supra*, and in *McRae v. Malloy*, 93—154, where "surprise" is used in the sense of duress, the argument of the court shows the tendency to depart from the old rule of actual force, and to apply the rule of moral duress or undue influence. See 1 Page Cont., sec. 244

et seq. In undue influence by duress there is always the idea of violence or force or advantage taken of the party's unfortunate condition, while in undue influence as explained in the next section, there is confidence reposed and abused.

Sec. 5. Undue influence.

LEE v. PEARCE, *Ante*, (141).

BEAN v. R. R., *Ante*, (117).

"To constitute undue influence it is not necessarily required that there should exist moral turpitude, or even an improper motive; but if a person, from the best of motives, having obtained a dominant influence over the mind of a grantor, thereby induces him to execute a deed or other instrument materially affecting his rights, which he would not have made otherwise, exercising the influence obtained to such an extent that the mind and will of the grantor is effaced or supplanted in the transaction so that the instrument, while professing to be the act and deed of the grantor, in fact and truth only expresses the mind and will of the third person, the actor who procured the result, such an instrument so obtained is not improperly termed fraudulent." *Myatt v. Myatt*, 149—137, 141.

Where the well-known confidential relations exist, the law presumes fraud, from the opportunity to use undue influence; but where undue influence is alleged apart from these relations, it must be proved. *Deaton v. Munroe*, 57—39; *Futrill v. Futrill*, 58—61; 59—337; *Burroughs v. Jenkins*, 62—33; *Riley v. Hall*, 119—406. Fair argument and persuasion is not undue influence. *Gilreath v. Gilreath*, 57—142; *Taylor v. Taylor*, 21—46. But undue influence may be shown by all the circumstances, as the extent of capacity, the nature of influence, the character of the parties, and their relation, the benefit derived, inadequacy of price, etc. *Amis v. Satterfield*, 40—p. 182. Mental weakness arising from old age is not alone sufficient, *Suttles v. Hay*, 41—124; *Pains v. Roberts*, 82—451; *Tatum v. White*, 95—453; neither is inadequacy of price, *Carman v. Page*, 59—37; *Berry v. Hall*, 105—154; *Potter v. Everett*, 42—152; but when advantage is taken of the weak mental condition to obtain property at an inadequate price, the sale will be set aside. *Green v. Brown*, 60—595. So where the incapacity results from drunkenness. *Freeman v. Dwiggin*, 55—162; *Calloway v. Witherspoon*, 40—128; or where confidence has been reposed and abused. *McCraw v. Davis*, 37—618; *Boyd v. King*, 57—152; *Mason v. Pelletier*, 82—40; *Elliott v. Logan*, 62—163; *Day v. Day*, 84—408; *Boutten v. R. R.*, 128—p. 341; *Beeson v. Smith*, 149—142; *Jackson v. Rowell*, 87 Ala., 685, 6 So., 95, 4 L. R. A., 637; *Boardman v. Lorentzen*, 155 Wis., 566, 145 N. W., 750, 52 L. R. A. (N. S.), 476.

Buying an expectancy is not such a contract as to be avoided unless there has been some imposition, and when set aside, the heir will have to account for what he got in the trade. *Masten v. Marlow*, 65—695; *Boles v. Caudle*, 126—352; 133—528; *McDonald v. Hackett*, 112—1556; *Wright v. Brown*, 116—p. 28; *Taylor v. Smith*, 116—p. 134; *Kornegay v. Miller*, 137—p. 669; *Bispham Equity*, sec. 220.

For discussion of undue influence in general, see 1 Page Cont., sec. 201 *et seq.*; *Bispham Eq.*, sec. 231 *et seq.*; *Clark Cont.*, 246; 29 Am. & Eng. Encyc., 102 *et seq.*

CHAPTER VIII.

ILLEGAL CONTRACTS.

Sec. 1. Agreements in violation of common law.

(144) IVES v. JONES,

25 N. C., 538, 40 A. D., 421—1843.

This was an action of *assumpsit*. The plaintiff was overseer of defendant and had contracted to purchase a tract of land from the defendant; the defendant told plaintiff that the fence did not run quite out to the line, and directed him to move the fence out on the line; that if one Ballance, who owned the adjoining land, did not agree to it, and should bring suit against him, he would pay all damages and save the plaintiff harmless; the plaintiff moved the fence, Ballance sued him and the defendant and another for trespass in moving the fence, and the present plaintiff had to pay the costs and damages, and upon defendant's refusing to indemnify him, brought this action. The court held that the verdict in the action of trespass did not discharge the defendant, and that although a promise to induce another to commit a wilful and wicked trespass would not be binding, yet the promise in this case was binding, because the plaintiff, being the overseer of the defendant and acting under his direction, did not commit a wilful and naked trespass, but was only asserting the right of the defendant. There was a verdict and judgment for the plaintiff, and the defendant appealed.

RUFFIN, C. J. We think His Honor put the case upon the true ground, and that the judgment must be affirmed. The correct distinction is stated in the case of *Merriweather v. Nixon*, 8 T. R., 186, which has been cited for the defendant. The particulars of that case are not given in the report, but the injury must have been forcible and wanton. For Lord Kenyon, after recognizing the general rule, that there could be no contribution between joint wrongdoers, nor, of course, redress upon a contract to do an unlawful thing, distinguishes that case from one, in which there could be redress, by saying "that decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." If it were not so, no one could ever expect assistance in enforcing his rights by means, even the most peaceable, which could subject the parties

to an action sounding in tort, and an end would be put to indemnities. For, if the right be with the party indemnifying, there is no need of the indemnity, and if it turn out to be in another, who recovers for the injury, the rule would make the indemnity void. But when the object is apparently in furtherance of justice and in the exercise of a right, and the means are not in themselves criminal, and not known by the person employed to be wrongful to a third person, there can be no objection to giving effect to a contract to save harmless one, who, from good motives, did an act for his employer, which, contrary to his expectation, happened to be an injury to a third person. That is not like the perpetrator of an act, manifestly unlawful and criminal, seeking redress against the procurer. Indemnity for acts apparently right, or not apparently wrong, have always been upheld.

As long ago as the case of *Arundel v. Gardner*, Cro. Jac., 652, it was held that an action would lie for the sheriff on a promise of indemnity, made by an execution creditor for levying on goods, as the property of the defendant in the execution, which were in the possession of another person, who was in fact the owner. The same doctrine has been recently held by the House of Lords, in *Humphreys v. Pratt*, 2 Dow & Clark, 288. If, in truth, such a seizure by a sheriff were a wanton act in him, well knowing that the property was in the possessor and not in the debtor, and made for the purpose of harrassing the former, he, as purely a wrongdoer, could receive no countenance from the law. But when it is made upon the assertion of the creditor, that the goods are the property of his debtor and liable to be seized, the conduct of the sheriff is fair, and being for the benefit of the creditor, it is manifestly just that the latter should make good his promise, that the officer should not be a loser by such an act. There have been other cases which have further extended the principle. In *Adams v. Jarvis*, 4 Bing., 66, the plaintiff, an auctioneer, sold goods under the order of the defendant, who represented himself to be entitled to them, and received the proceeds from the auctioneer, from whom, however, the true owner afterwards recovered the value, and it was held that the action would lie to recover back the damages and costs. Chief Justice *Best* thus expressed himself: "Every person, who employs another to do an act, which the employer appears to have a right to authorize, undertakes to indemnify him for all such acts as would be lawful, if the employer had the authority he pretends to have, and a contrary doctrine would create great alarm." He added, "that from the concluding part of Lord *Kenyon's* judgment, in *Merriweather v. Nixon*, and from reason, justice and sound policy, the rule, that wrongdoers can not have redress against each other, is confined to cases, where the person

seeking redress must be presumed to have known that he was doing an unlawful act." In *Betts & Drew v. Gibbins*, 2 Adol. & El., 57, the defendant sold ten cases of goods to N & W, and sent them to the plaintiffs, with notice that they were for N & W, and with directions to deliver them. After delivering two casks, the plaintiffs were ordered by the defendant, and indemnified not to deliver any more to N & W, but to deliver the remainder to another person—which they did. The plaintiffs were then sued in trover by the assignee of N & W, who had become bankrupts, and for the damages and costs in that action the plaintiffs then sued the defendant and had judgment. Lord *Denman* said, supposing there was a *bona fide* doubt, the plaintiff has a right to act upon the instructions of the defendant, and might come on him for the consequences of so doing. He further said that the case of *Merriweather v. Nixon* had been strained beyond what the decision would bear, that the general rule is that between wrongdoers there is neither indemnity nor contribution, but there is an exception, where the act is not clearly illegal in itself. And one of the other judges remarked that the case bore no analogy to those, in which an indemnity is claimed for acts obviously unlawful, like breaches of the peace, or to cases in which the conduct of the parties is in contravention of public policy. In the case at bar, the defendant claimed to be owner of land up to a particular line, and ordered the plaintiff, who was in his employment, to set his fence to the line, and the plaintiff, simply for obedience to those orders and without having committed any public offense, and being innocent of any intentional wrong to any other person, has been compelled to pay damages and costs for the trespass, to a person who turned out to be the owner of the land, and now sues on the defendant's express promise of indemnity. Surely no claim could have a broader foundation of justice, or, as we think, law, to support it. The verdict in the former action, acquitting the defendant, avails nothing here. It only shows that the plaintiff in that action could not prove the present defendant's orders, or indemnity to the present plaintiff. But, as between the present parties, those facts were not in issue before, and therefore neither is concluded.

Per Curiam.

Judgment affirmed.

(145) *BLYTHE v. LOVINGGOOD*,

24 N. C., 20, 37 A. D., 402—1841.

Action on promissory note, not under seal. At a public sale of land belonging to the State, one of the conditions of the sale was that if the highest bidder did not give his bond by a certain time, the next highest bidder might come forward and take the land.

The plaintiff was the highest bidder and the defendant next; they agreed that the plaintiff should fail to comply with his bid and allow the defendant to take the land at the lower bid, and that the defendant should pay the plaintiff \$100. A note was given for that amount, and in an action on the note the defendant set up the illegal consideration. The court held the consideration to be sufficient, and from a judgment against him the defendant appealed.

DANIEL, J. If the plaintiff intended to comply with the terms of the sale, but failed in consideration of the defendant's executing to him the note, then the conspiracy had the effect of depriving the State of so much of the purchase-money as made up the difference between the two bids; and such a transaction, we think, was fraudulent towards the State. The plaintiff's counsel contends, that, if the parties intended to defraud the State, it could be taken advantage of by the State only, and not by the defendant who has reaped the benefit, and was a *particeps criminis* in the transaction. We are of a different opinion. The law prohibits everything which is *contra bonos mores*, and, therefore, no contract, which originates in an act contrary to the true principles of morality, can be made the subject of complaint in the courts of justice. It has been repeatedly decided in England, that the vendor of goods could not recover the price of the vendee, when he had aided the vendee, either in packing or otherwise, to defraud the revenue laws of that country. *Clugas v. Penabena*, 4 T. R., 466; *Waywell v. Reed*, 5 T. R., 599. So a contract, which is a fraud on a third person, may, on that account, be void as to the parties to it, as where A succeeded B in a house, and, not being able to pay for the furniture, proposed to D, his friend, to advance money for him, who accordingly treated with B, and agreed to purchase the furniture for A at £70, which sum he paid B; but there was a private agreement between A and B, that A should pay a further sum of £30, over and above the £70; and, in pursuance thereof, A gave B two promissory notes of £15 each, for that sum. Held, that he could not recover on the notes, as the private agreement was a fraud upon D, who had advanced the £70 in confidence that it was the whole consideration. *Jackson v. Ducharie*, 3 T. R., 551. So where a surety gave a guaranty to A for a certain amount of goods to be sold to B, and the latter agreed to pay 10s. per ton beyond the market price, in liquidation of an old debt due to A, without communicating the bargain to the surety. Held, that it was a fraud upon the latter, and the guaranty was void. *Pidcock v. Bishop*, 10 Eng. C. L., 197. Lord *Mansfield* said (in *Holman v. Johnson*, Cowp., 343), "The objection that a contract is immoral or illegal, as between the plaintiff and defendant, sounded at all times very ill in the mouth of the defendant. It is not for his

sake, however, that the objection is even allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the action appears to arise *ex turpi causa*, or the transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon this ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." We are of the opinion that the agreement in this case was in pursuance of a fraudulent design to deprive the State of a fair price for its land, and that the plaintiff ought not to recover. There must be a New trial.

The maxims which control in such cases are, *ex turpi causa non oritur actio*, and *in pari delicto potior est conditio defendantis*.

Indemnity contracts.—Griffin v. Hasty, 94—438; Turrentine v. Faucett, 33—652; Denson v. Sledge, 13—136; Roper v. Laurinburg, 90—427; 4 L. R. A., 682; 20 L. R. A. (N. S.), 58.

Fraud on creditors.—Executory contracts made to defraud creditors will not be enforced, nor will executed contracts be set aside as between the parties. Powell v. Inman, 52—28, 53—436; York v. Merritt, 77—213, 80—285; Pinkston v. Brown, 56—494.

In compositions with creditors the utmost good faith is required, and any agreement with one creditor, not known to the others, by which he is to receive a preference, is void. Guano Co. v. Emry, 113—85; 6 Am. & Eng. Encyc., 392; Clark Cont., 256; Page Cont., sec. 404; 27 L. R. A., 33; 9 Cyc., 468.

Fraud in auctions.—By-bidding may be a fraud upon the purchaser; agreements not to bid may be a fraud upon the seller; and contracts made for such purpose would be void. Ingram v. Ingram, 48—188; King v. Winants, 71—469, 73—563; Smith v. Greenlee, 13—126; Whitaker v. Bond, 63—290; Davis v. Keen, 142—496; Henderson-Snyder Co. v. Polk, 149—104; Owens v. Wright, 161—127. Where the agreement is not to stifle competition, but for an honest purpose, it is valid. Goode v. Hawkins, 17—393; Graham v. Reid, 13—364; Bailey v. Morgan, 44—352; Satterfield v. Kindley, 144—455; Ruis v. Branch, 138 Ga., 150, 74 S. E., 1081, 42 L. R. A. (N. S.), 1198; Clark Cont., 258; Page Cont., sec. 405; 15 Am. & Eng. Encyc., 950; 9 Cyc., 470.

Sec. 2. Agreements in violation of statute.

1. In general.

(146) SHARP v. FARMER,

20 N. C., 255—1838.

Action of *assumpsit*, commenced by Sharp and wife, and upon her death, continued by him as administrator.

The plaintiff claimed a distributive share of an estate in right of his wife; he and his wife made an agreement with the defend-

ant, that the latter was to settle the estate without taking out letters of administration, and pay over the amount due for distribution; the defendant sold the property and paid the debts, and this action was brought for the balance due for distribution. The court held that the plaintiff was entitled in his own right and not as administrator, directed a nonsuit, and the plaintiff appealed.

RUFFIN, C. J. The point, whether the right of action on the contract, supposing it to be a lawful and valid contract is in the husband in his own right, or survived to him as administrator of his wife, involves much nice learning. We are relieved from going into it by other matter apparent in the record, upon which we are satisfied that neither the husband, nor the husband and wife together, could have an action upon this contract. It is an agreement between the next of kin of an intestate for an administration of the estate and its distribution by one of them, without obtaining letters of administration, or taking the oath of office, or giving bond. This is prohibited by the Act of 1715, Rev. Ch., 10, secs. 4 and 5, under a penalty of fifty pounds. (See 1 Rev. Stat., chap. 46, sec. 8.) After a vast number of cases upon the subject, it seems to be now perfectly settled that no action will be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute. The distinction between an act *malum in se* and one merely *malum prohibitum* was never sound, and is entirely disregarded; for the law would be false to itself if it allowed a party through its tribunals to derive advantage from a contract made against the intent and express provisions of the law. *Lankton v. Hughes*, 1 Maul. & Selw., 593, and *Beasley v. Bignold*, 5 Barn. & Ald., 341, establish this principle upon consideration of all previous cases. It will be seen at once that the court could not give the plaintiff a judgment; since by the very act of receiving the sum recovered the plaintiff would be executor *de son tort*, which is a consequence to which the court can not allow itself to be made accessory.

The nonsuit must therefore stand and the judgment be

Affirmed.

See Revisal, sec. 1; to same effect, *Ramsey v. Woodward*, 48—508; *Carter v. Greenwood*, 58—410; *Mitchell v. Mitchell*, 132—350. It being unlawful to remove an apprentice, a contract based upon such removal is void. *Futrell v. Vann*, 30—402; or to assign his services, *Allison v. Norwood*, 44—414. A contract will be void even if not expressly forbidden, if it is against the general policy or intent of the statute. *Moore v. Woodard*, 83—p. 532; *Lloyd v. R. R.*, 151—536; *Koepke v. Peper*, 155 Iowa, 687, 136 N. W., 902.

Weights and measures must be of proper standard and tested, and the use of any other subjects the user to a penalty, Revisal, 3063, 3067, 3073. It has been held in some courts that a dealer failing to comply with such

a statute could not recover the price, 30 Am. & Eng. Encyc., 459, 462, 463; Clark Cont., 263; the question has not been raised in this State, except as to the penalty. Sutton v. Phillips, 116—502, 117—228; Nance v. R. R., 149—366; Levison v. Boas, 150 Cal., 185, 88 Pac., 825, 12 L. R. A. (N. S.), 585.

Failure to put a revenue stamp on an instrument, when required, affects it as evidence only in the Federal courts. Davis v. Evans, 133—320.

See generally, 1 Page Cont., secs. 327-334; 9 Cyc., 475; 15 Am. & Eng. Encyc., 938; Clark Cont., 260; 6 R. C. L., 699.

2. Profession or trade.

(147) PUCKETT v. ALEXANDER,

102 N. C., 95, 8 S. E., 767, 3 L. R. A., 43—1889.

This was a civil action by the plaintiffs against the defendant, as administrator, for the settlement of an estate.

The defendant held a diploma, from a regular medical college in 1876, and had been practicing medicine since that time. He was not licensed by the State Board as required by The Code, vol. 2, chap. 34; he was employed by his intestate to attend him as a physician during the year 1883, and his bill was presented to the intestate during his life, and he promised to pay the same; the plaintiff as administrator retained his bill, \$325, out of the estate, and the clerk allowed it.

The court below sustained the exception of the plaintiff to the ruling of the clerk, and the defendant appealed.

SHEPHERD, J. The Act of Assembly of 1852, chap. 258, sec. 2, reenacted by sec. 3122 of The Code, provides that "no person shall practice medicine or surgery, nor any of the branches thereof, nor in any case prescribe for the cure of diseases, for fee or reward, unless he shall be at first licensed to do so in the manner herein-after provided; Provided, that no person who shall practice in violation of this chapter shall be guilty of a misdemeanor." Section 2 of the same act, reenacted by sec. 3132 of The Code, provides that such persons shall not be entitled to sue for or recover before any court for such services. The defendant has been constantly practicing medicine since he received a diploma from a regular medical college in 1867, and for "fee or reward" rendered the services in 1883, which constitute the basis of his claim in this action. The performance of such services for fee or reward was absolutely prohibited by the statute, and the contract was, therefore, void in its inception. It is immaterial whether the act of the defendant was *malum in se* or one merely *malum prohibitum*.

Ruffin, C. J., in Sharp v. Farmer, 20 N. C., 255, says that the distinction between these "was never sound, and is entirely disregarded; for the law would be false to itself if it allowed a party,

through its tribunals, to derive advantage from a contract made against the intent and express provisions of the law."

The defendant, however, insists that vitality is given to this void contract by chap. 261, Acts 1885, which provides that sec. 3132 of The Code be amended "by adding after the last word of said section the words: Provided, that this section shall not apply to physicians who have a diploma from a regular medical college prior to January the 1st, 1880."

What effect this proviso has upon sec. 3122 by way of repealing its prohibitory features as to such cases, we are not now called upon to decide, as the amendatory act is clearly prospective, and does not affect the case before us. *Richardson v. Dorman*, Extrx., 28 Ala., 681; *Dwarris on Statutes*, 162, *et seq.* Even if the statute were in terms retroactive, and repealed sec. 3122, it could not have the effect of creating a liability. "A contract, void at the time of its inception, can not be validated by subsequent legislation, and if it violates, when made, a statute, the repeal of that statute does not make it operative." *Wharton's Law of Contracts*, vol. 1, sec. 368. If the contract had not been void by reason of sec. 3122, the defendant would have been entitled to enforce his claim after the passage of the amendatory act, the effect of which was to remove the disability to sue imposed by sec. 3132, that section not affecting the right, but the remedy only. *Hewit v. Wilcox*, 1 Metcalf, 154.

It is further contended that, notwithstanding this construction of the several acts of Assembly, the defendant is entitled to enforce his claim, by reason of the express promise of his intestate to pay for the services. The date of this promise does not appear from the case prepared by the court below.

The record shows that administration was granted before the passage of the Act of 1885. However this may be, we are of the opinion that, the contract being void in its inception, there was no consideration to support the promise, and it is, therefore, ineffectual to sustain the defendant's demand. The doctrine of a purely moral consideration being sufficient to support an express promise, attributed to Lord Mansfield, was, as is said by Mr. Wharton in his work on *Contracts*, *supra*, sec. 512, "soon abandoned in his own court, and it is now settled, both in England and the United States, that no merely moral obligation, no matter how strong, can support a promise unless the benefit from which the obligation arises was conditioned on the promise."

In the elaborate note to the case of *Senall v. Adney*, 3 Bos. & Pul., 252, the true rule, it seems to us, is laid down: "That if a contract between two persons be void and not merely voidable, no subsequent express promise will operate to charge the party prom-

ising, even though he has derived a benefit from the contract." This view is fully sustained in *Felton v. Reid*, 52 N. C., 269, and in *Smith on Contracts*, 203, where the author quotes, with approval, the language of *Tindall*, C. J., that "a subsequent express promise will not convert into a debt that which, of itself, was not a legal debt."

We are of the opinion that there was no error, and that the judgment should be . Affirmed.

(148) VINEGAR CO. v. HAWN,

149 N. C., 355, 63 S. E., 78—1908.

The plaintiff's predecessor, or assignor, was engaged in the sale of cider, which was intoxicating, and contracted to sell and deliver cider to the defendant in Hickory, knowing that such sale was prohibited by the laws of the State at the time of such contract of sale and of the delivery. There was a judgment for defendant, and the plaintiff appealed.

CLARK, C. J. . . . The jury found that the contract was made in Hickory; that it was agreed that the delivery was to be made there, and that delivery was in fact made there. This made the transaction illegal. *State v. Johnston*, 139 N. C., 640; *State v. Herring*, 145 N. C., 418. This is not a case where a drummer here took an order for liquor to be shipped in from another State, as was alleged in *State v. Hanner*, 143 N. C., 632.

There is no prayer for instruction raising that point, but if there was, the contract being made in Hickory to deliver there would make this an illegal contract, and the courts will not lend their aid to collect an account based on such contract. If the liquor was shipped in from another State, that was simply the method the plaintiff took to procure it for his purposes. The delivery to defendant was agreed to be made in Hickory, and was so made. The plaintiff can not violate the law by an illegal contract and then ask the courts to help him enforce it.

When, as here, the parties are *in pari delicto*, the courts will help neither. If the money has been paid, it can not be recovered back unless the statute so provides (as in regard to usury, *Revisal* 1951), and if not paid, the courts will not aid collection. It will leave the parties to their own devices. *King v. Winants*, 71 N. C., 469; *Griffin v. Hasty*, 94 N. C., 438; *Basket v. Moss*, 115 N. C., 448; *McNeill v. R. R.*, 135 N. C., 733; *Oscanyan v. Arms Co.*, 103 U. S., 261 (which says, "Even if the invalidity of the contract be not specially pleaded"); *Ewell v. Daggs*, 108 U. S., 146. The law will not lend its aid where the contract "appears to have been entered into by both the contracting parties for the ex-

press purpose of carrying into effect that which is prohibited by law." Broom's Legal Maxims, 108. The Oklahoma court neatly sums up the doctrine thus: "The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." *Kelly v. Courter*, 1 Okla., 277.

No error.

There are many regulations in regard to professions and trades given in the Revisal: Dentists, 3642; physicians, 3645, 3646; embalming, 3644; pharmacy, 3649-3654; trained nurses, 3656; peddlers, 3789; attorneys, 207; auctioneers, 219; insurance, 4746 *et seq.*; child labor in factories, 3362; and dealing in various articles, mentioned in Revisal, chap. 81. Sale of liquor, *Liquor Co. v. Johnson*, 161—74; *Pfeifer v. Israel*, 161—409; *Bluthenthal v. Kennedy*, 165—372. Violation of statute generally, *Buckley v. Humason*, 50 Minn., 195, 52 N. W., 385, 16 L. R. A., 423; *Deaton v. Lawson*, 40 Wash., 486, 82 Pac., 879, 2 L. R. A. (N. S.), 392; *Schafer v. Johns*, 23 N. D., 593, 137 N. W., 481, 42 L. R. A. (N. S.), 412. A sale of liquor for over \$10 on credit, contrary to act of 1798, Revisal, 977, makes the whole contract void. *Covington v. Threadgill*, 88—186.

There is a distinction made between a regulation for revenue only, and one intended to prohibit the act and protect the public. *Clark Cont.*, 261. This would seem to be the difference between the annual tax of \$5, imposed on lawyers, doctors, etc., and the payment of license fees. *Johnson v. Berry*, 20 S. D., 133, 104 N. W., 1114, 1 L. R. A. (N. S.), 1159; 6 R. C. L., 704.

3. Sunday contracts.

(149) MELVIN v. EASLEY,

52 N. C., 356—1860.

Action on the case for deceit and false warranty in the sale of a horse. There was a judgment for the plaintiff, and defendant appealed.

PEARSON, C. J. The defendant sold a horse to the plaintiff with a warranty of soundness which was false. The sale was made on Sunday, in the country, no one being present except the parties and a witness. The defendant was a horse-trader, which was known to the plaintiff. The question is, can the defendant defeat the action because the sale was on Sunday?

The defense was put on the statute, Rev. Stat., chap. 118, sec. 1: "That all and every person or persons whatsoever shall, on the Lord's day, commonly called Sunday, carefully apply themselves to the duties of religion and piety, and that no tradesman, artificer, planter, laborer, or other person whatsoever, shall, upon the land or water, do, or exercise any labor, business, or work, of their ordinary calling (works of necessity and charity only excepted) on the Lord's day, aforesaid or any part thereof, on pain, that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay the sum of one dollar." This statute is taken from 29 Car. 2, chap. 2, sec. 1, which was enacted in this

colony in 1741, and reenacted after the adoption of the Constitution. My opinion is that the defense can not be supported, and I put it on two grounds:

I do not believe the plaintiff comes within the operation of the statute. Buying horses was not his "ordinary calling," so the statute does not prohibit him from doing so, or impose any penalty upon him.

I admit that if a shop is kept open on Sunday, or goods are sold at auction, the price can not be recovered; I also admit, for the sake of the argument on this view of the case, that the defendant could not maintain an action for the price of the horse. It is said the plaintiff knew the defendant was a horse-trader and concurred in his violation of the statute, and consequently, was *particeps criminis*. Does this consequence follow? In crimes, there are accessories; in misdemeanors, all who aid or concur are held to be equally guilty, and are subject to like punishment with the party who commits the offense. This plaintiff is not guilty of violating the law, and is not subject to a penalty, so he can not be *particeps criminis* in the legal sense of the term. He is not in *pari delicto*, and it is against the policy of the law, and will defeat its object so to consider him. The court will not aid any person who violates the law; therefore, the defendant could not maintain an action. This rule is adopted on the ground of policy, for the purpose of preventing a violation of the law, and if confined in its operation to the actual offender, its application will be salutary, but if it be extended to the party who is not an offender, so far from checking, it will encourage a violation of it, by letting it be known to "horse-traders," "shop-keepers" and "all whom it may concern," that they may *cheat with impunity*, provided always, it may be done on the Lord's day! They will readily purchase "this indulgence and dispensation" by paying "one dollar," if it should be sued for.

If it be said this will prevent people from trading with them, the reply is, that is not the object of the statute, but to prevent "tradesmen," "artificers," etc., from exercising their ordinary calling on Sunday, etc., so this action of the court shifts the operation and fixes the burden on those not included in the prohibition, and upon whom, *alone*, the penalty is imposed.

Our attention was called in the argument to a remark of *Bailey*, Judge, in *Bloxome v. Williams*, 3 Barn. & Cress., 232 (10 E. C. L. Rep., 60). In that case the plaintiff did *not know* that the defendant was a horse-trader, and it is held that he could recover, and the learned Judge incidentally says: "If the plaintiff had known the defendant was a horse dealer, such knowledge of the illegality of the contract would have prevented him from main-

taining the action." This was a mere *dictum*, not even called for in aid of the argument. I can not suppose that the learned Judge took time to consider of it, for he overlooks the fact that the prohibition and the penalty apply to the *defendants only*.

In the second place, I do not believe a contract, like that under consideration, comes within the operation of the statute. A contract made on Sunday may be enforced by an action at common law. This is settled. *Drury v. Defontaine*, 1 Taunton, 130, in which it is decided that one, whose ordinary calling was to sell horses at auction, may recover the price of a horse sold on Sunday at private sale. The ordinary calling of the defendant was to sell horses at private sale, and I admit that this case comes within the words of the statute, although the sale was made in the country, where no one was present except the parties and the witness. So the case of a lawyer, who sits in his room and reads a law book, or writes a deed, or a merchant, who in his counting-room, posts his books, or an old lady, who sits by her fireside and knits, if done on Sunday, comes within the words of the statute. But my opinion is that the statute is void and inoperative in respect to cases of this kind, and that its operation is confined to manual, visible or noisy labor, such as is calculated to disturb other people; for example, keeping an open shop or working at a blacksmith's anvil, or crying an auction in a town. The Legislature has power to prohibit labor of this kind on Sunday, on the ground of public decency, and to prevent public devotion from being disturbed; in the same way as the exhibition of animals or the sale of spirituous liquors within a certain distance of a religious assembly is prohibited. But when it goes further, and on the ground of forcing all persons to observe the Lord's day, and carefully *apply themselves to the duties of religion and piety on that day*, prohibits labor which is done in private, and which does not offend public decency or disturb the religious devotions of others, the power is exceeded, and the statute is void for the excess, by force of the "declaration of rights," sec. 19: "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own conscience." Ours is a Christian country, but Christianity is not established by law, and the genius of our free institutions requires that "Church" and "State" should be kept separate. In England, religion is established by law. The head of the Church is the head of the State, and the statute 29 Car. 2, has full force and effect. Here, there is a different condition of things, and only such part of the statute as is necessary to enforce public decency is of force and effect. In *Fennell v. Ridler*, 5 Barn. & Cress., 406 (11 E. C. L. Rep., 261), the case of a private sale, by a horse-dealer, on Sunday, is held to be within the operation of the statute, on the

express ground that "the spirit of the act is to advance the *interest of religion*, to turn a man's thoughts from his worldly concerns and to direct them to the duties of piety and religion, and the act can not be construed according to its spirit, unless it is so construed as to check the course of worldly traffic." This is the language of *Bayley*, Judge, who, in the case of *Bloxome v. Williams*, *supra*, expressed a doubt whether the statute applies to a bargain of this description, and inclined to think "that it applies only to manual labor and other work visibly laborious, and the keeping of open shops." This was while he was under the impression that the intention of the act was to promote "public decency," but afterwards, in *Fenner v. Ridler*, *supra*, upon further consideration, he expressed himself satisfied that "there was nothing in the act to show that it was passed exclusively for promoting public decency, and not for *regulating private conduct*. Labor may be private and not meet the public eye, and so not offend against public decency, but it is equally labor, and equally interferes with a man's religious duties." So these two cases establish the position, that considering the act as passed exclusively for promoting public decency, the case of a private sale would not come within its operation, and it was only by extending its object to the regulation of *private conduct*, and the enforcement of *religious duties*, that such a sale was brought within its operation; it follows that a private sale is not within the operation of the statute, so far as it can be allowed force and effect.

The cases cited from the New England States have no bearing. Their statutes prohibit *all secular labor* on the Sabbath, and the notions there entertained are far more strict and intolerant than the sentiments that have heretofore prevailed in this State.

The general one of *State v. Williams*, 26 N. C., 400, and *Shaw v. Moore*, 49 N. C., 25, fully accords with this conclusion. In my opinion there is

No error.

Manly, J., files a concurring opinion; *Battle*, J., files dissenting opinion.

The present law is Revisal, 2836. See discussion by *Ruffin*, C. J., in 26—400, and by *Clark*, C. J., in *Rodman v. Robinson*, 134—503.

Service of process on Sunday is valid unless prohibited by law. *White v. Morris*, 107—p. 99; Revisal, 2837. While Sunday is not a juridical day, courts may sit on Sunday by necessity, and a verdict and judgment may be rendered. *Taylor v. Ervin*, 119—274.

Conflict of laws.—Where the *lex loci* prohibits Sunday contracts, the court will not consider the market price prevalent on that day, in determining damages for breach of contract to transport cattle to market. *Absher v. R. R.*, 108—344; *Waters v. R. R.*, 108—349. The illegal purpose of the plaintiff to sell on Sunday can not excuse the defendant for negligence, unless that entered into the consideration between them. *S. C.*, 110—338. Sunday trains, Revisal, 3844; *Lovell v. B. & M. R. R.*, 75 N. H., 568, 78 Atl., 621, 34 L. R. A. (N. S.), 67.

On Sunday contracts generally, see *Bryan v. Watson*, 127 Ind., 42, 26

N. E., 666, 11 L. R. A., 63; *Allen v. Duffie*, 43 Mich., 1, 4 N. W., 427, 38 A. R., 159; *Jacobson v. Bentzler*, 127 Wis., 566, 107 N. W., 7, 4 L. R. A. (N. S.), 1151; *King v. Graef*, 136 Wis., 548, 117 N. W., 1058, 20 L. R. A. (N. S.), 86; *Collins v. Collins*, 139 Iowa, 703, 117 N. W., 1089, 18 L. R. A. (N. S.), 1176, 16 Ann. Cas., 630; Page Cont., secs. 455-460; *Clark Cont.*, 265; 27 Am. & Eng. Encyc., 403; 37 Cyc., 557.

4. Usury.

(150) WARD v. SUGG,

113 N. C., 489, 18 S. E., 717, 24 L. R. A., 280—1893.

Action to enjoin a sale under a mortgage, and to have a note and mortgage canceled for usury. There was a verdict and judgment for defendant, and plaintiff appealed.

CLARK, J. The jury found that the note for \$400 in suit was wholly given for an usurious charge for use of money, and that the present holder acquired it before maturity, for value and without notice. The question, whether it is valid in his hands is not an open one in this State. Such note is held to be void into whatsoever hands it may pass. *Ruffin v. Armstrong*, 9 N. C., 411; *Collier v. Nevill*, 14 N. C., 30. Such was also the law in England until it was, in some respects, modified by the Act of 58 George III, and is still the law in New York and other States, except where modified by statute. *Randolph on Commercial Paper*, sec. 525; 3 *Lawson Cont.* (5 Ed.), 117; *Powell v. Waters*, 8 Cowen, 669; *Wilkie v. Roosevelt*, 3 John Cas., 206; *Solomons v. Jones*, 5 Am. Dec., 538; *Oneida v. Ontario*, 21 N. Y., 495, cited by *Smith*, C. J., in *Rountree v. Brinson*, 98 N. C., 107; *Callahan v. Shaw*, 24 Iowa, 441.

When the statute makes a note void it is void into whosoever hands it may come, but when the statute merely declares it illegal the note is good in the hands of an innocent holder. *Glenn v. Bank*, 70 N. C., 191, 206. Hence it was argued strenuously that the authorities above cited were good under our former statute, which made the contract void, but that the present statute merely makes the contract illegal. It does not seem so to us. The former statute (Rev. Code, chap. 114; Rev. Stat., chap. 117), denounced the contract as void as to the whole debt, principal and interest. The present statute (The Code, sec. 3836), makes it void, not as to principal, but as to the interest only. It provides that "the taking, receiving, reserving or charging a rate of interest greater than is allowed . . . shall be deemed a forfeiture of the entire interest . . . which has been agreed to be paid," with a further provision that, if such interest has been paid, double the amount can be recovered back by the debtor. The only difference between the two acts is that formerly the whole note was forfeited

and of no avail, and now only the stipulation as to the interest is *ipso facto* deemed forfeited and void. But the point has already been adjudicated by this court.

In two cases this court—and by most eminent judges—has expressly held that the words, “deemed a forfeiture,” in the Act of 1876-7 (now The Code, sec. 3836), makes void the agreement as to interest. If any attention is to be paid to the doctrine of *stare decisis*, the precedents in our own court do not leave this open to debate.

In *Bank v. Lineberger*, 83 N. C., 454 (on page 458), *Ashe, J.*, quotes this section in full, and says: “The purpose and effect of this statute were not only to make void all agreements for usurious interest, but to give a right of action to recover back double the amount after it has been paid.” *Dillard, J.*, in *Moore v. Woodard*, 83 N. C., 531 (on page 535), says: “They (the notes there sued on) are both wholly for illegal interest, if the allegations of the answer be true, and, if so, the sentence of the law is that they are void;” and further says: “The device of taking a distinct bond and mortgage for the interest does not take the case out of the operation of the statute.” The opinion of such judges speaking for a court, constituted as the bench then was, are surely entitled to be considered the law in this State until changed by legislation. And in *Glenn v. Bank*, 70 N. C., 191 (bottom of page 205), *Rodman, J.*, says: “It is admitted law that notes vitiated by an usurious or gaming consideration can not be enforced in the most innocent hands, but are always and under all circumstances void.”

In 1 Daniel Neg. Inst., sec. 198, it is stated that, where the statute provides that, “in an action brought on a contract for payment of money it shall appear that unlawful interest has been taken, the plaintiff shall forfeit threefold the amount of the unlawful interest so taken, it was held to apply to the innocent endorsee of a note, who received it in due course of trade; and, as a general rule, all contracts founded on considerations which embrace an act which the law prohibits under a penalty are void,” citing *Kendall v. Robertson*, 12 Cush., 156; *Woods v. Armstrong*, 54 Ala., 150. In *Kendall v. Robertson*, the Massachusetts law had undergone a change similar to ours, and *Shaw, C. J.*, says: “The former law extended the entire forfeiture to any holder of the note, though an innocent endorsee. The natural conclusion is, in the absence of express words changing the operation of the law, that it was the intention of the Legislature to extend such partial forfeiture in like manner, and attach it as before to the note, although held by an innocent endorsee without notice. In both cases the intention of the Legislature seems to have been the same,

to suppress a mode of lending regarded as dangerous and injurious to society, by attainting the contract, and attaching the penal consequence to the contract itself, whenever set up as a proof of a debt." And at last term of this court (*Moore v. Beaman*, 112 N. C., 558), it is said: "The contract, usury being pleaded, is simply a loan of money, which, in law, bore no interest."

Our own decisions upon our own statute should govern, even though a court of another jurisdiction upon a somewhat similar statute had ruled differently. But in fact the case relied on to that effect (*Oates v. Bank*, 100 U. S., 239), merely holds that the contract, being not void *in toto*, but only as to the interest, "being legal in part, and vicious in part, the former will support a contract of endorsement." But here the note is solely for usury and, being wholly vicious, the case cited is authority against its validity in the hands of the assignee.

The note for the usurious interest being in the hands of the assignee, he and not the maker must suffer. The law regards the maker not as *in pari delicto* with the payee, but as the victim of an oppression which the law has denounced and prohibits under penalty. *Bank v. Lutterloh*, 81 N. C., 144. If, by passing the note before maturity and for value, the endorsee may recover on it, the statute is useless, as the protection intended and prohibition are alike rendered nugatory. The victim would have no recourse but to suffer in silence. The usury would be collected in spite of the law which had declared the "entire interest forfeited" *ab initio*, by the fact of "charging or reserving" it. On the other hand, the innocent endorsee has his recourse upon the payee who has endorsed the note to him (*Daniel on Neg. Inst.*, sec. 807), a recourse which would more surely protect him, being against the party who has money to loan, not to borrow. At any rate, the fact that the endorsee's sole remedy, as to the interest, is against the payee and endorser, not against the maker, will cause such lenders to be more chary of shouldering off upon innocent parties the collection of their usurious contracts.

The only case in our Reports that seems to mitigate against the otherwise uniform tenor of our decisions on this subject is *Coor v. Spicer*, 65 N. C., 401, which held that a mortgage given to secure a usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the statute, Rev. Code, ch. 50, sec. 5 (now The Code, sec. 1549). Aside from the fact that this is held expressly otherwise in the later case of *Moore v. Woodard*, 83 N. C., 531, an examination of section 1549 will show that *Coor v. Spicer* was a palpable inadvertence. The statute cited (The Code, sec. 1549), in fact does not purport

to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate or property" at sale under the mortgage, who buys without notice of the usurious taint in the debts secured. It would be a fraud for the mortgagor to stand by and let him purchase without giving him notice, but the maker can give no notice usually to the assignee of the note. There is a broad distinction which runs through all the cases everywhere between contracts upon an illegal consideration as to which, the parties being *in pari delicto*, the courts will aid neither party, but will protect the note in the hands of a holder for value without notice, and a contract which, in whole or in part, is declared void or forfeited in its inception which can acquire no validity by being passed on to other hands. *Henderson v. Shannon*, 12 N. C., 147; *Glenn v. Bank*, *supra*. As to usurious contracts, the law regards the maker, not as *in pari delicto*, but as acting "in chains" (1 Story Eq. Jur., sec. 302), and to permit his contract, which is demed exacted under duress, to come under this general rule in favor of innocent holders for value of commercial paper, would be to nullify the protecting statute. The recourse of the holder is against the payee and endorser, who is more likely by far to be able to respond than the maker.

The statute makes the "taking, receiving, reserving or charging usury, 'when knowingly done,' *i. e.*, intentionally done, and not by a mere error of calculation, a forfeiture (not merely forfeitable) of the entire interest which the note carries with it, 'or which has been agreed to be paid thereon.'" The note in this case falls exactly within the evil denounced in the last clause. It is a written promise to pay the usury reserved or charged on the note, and such charging or reserving is *ipso facto* a forfeiture which attaches either by the taking, receiving, reserving or charging, as the law-makers evidently intended to prevent and head off all casuistry for which this class of law-breakers have, in all times, been specially noted, and to carry out the legislative intent of *bona fide* protecting the public, not nominally, but in fact, from evasions of this law. But if in truth the forfeiture was limited to the "knowingly receiving," the holder of this note certainly knows now, and doubtless did before suit brought, that this note was given for usury "agreed to be paid," and his receiving it would, *eo instanti*, work a forfeiture. Besides, if the maker should have voluntarily paid this note, the receiver of such payment knowing it was for usury, the statute gives the person, "by whom it was paid, or his legal representatives," an action to recover back twice the amount. *Cui bono*, then, shall the debtor be compelled by law to pay the usurious note, when, instantly, he can recover back double the sum of the party to whom he pays it, as a punishment for knowingly

receiving it? Such multiplicity of actions was not tolerated under the old practice, and certainly will not be under the present simpler and more practical system of procedure.

Bank v. Lutterloh, 81 N. C., —, was decided under the Act of 1866, and, to cure the defect in that act, the wording of the present statute is made explicit and gives the action to recover back. Under the Act of 1866 there was no forfeiture, as now, but simply interest could not be collected. While the charging, reserving, etc., is now a forfeiture of the contract as to all interest *ab initio*, the recovery of double the sum paid is necessarily from the party to whom it is paid, for the language is "may recover back" double the sum paid, which can only be from the party receiving the money.

With the policy of the law-making power the courts have nothing to do further than as it may throw light upon the meaning of the statute by considering the evil to be remedied. That is thus considered by *Taylor*, C. J., in *Ruffin v. Armstrong*, 9 N. C., 411, 416: "It is not less important now than it was then to restrain the power of amassing wealth without industry, and to prevent those who possess money from sitting idle and fattening on the toil of others. It is not less important to prevent those who desire profit from their money without hazard from receiving larger gains than those who employ it in undertakings attended with risk, calculated to encourage industry and to multiply the sources of public prosperity. Nor is it less important to facilitate the means of procuring money on reasonable terms, and thereby to render the lending of it more extensively beneficial."

In a matter so capable of oppression as the lending of money, the Legislature has deemed it wise to regulate the limit of what is a reasonable exaction for its use, since all interest is the creation of statute. *Beaman v. Moore*, *supra*. As to lenders upon a lawful rate of interest, the Legislature has looked upon them with a favorable eye and of late years has raised the limit from six to eight percent. But there is nothing in the action of the Legislature, nor in the circumstances of the day, which indicates that this is a propitious time to relax the restrictions placed heretofore upon the illegal exactions of those who would use their money contrary to law, and yet call upon the law to aid them, directly or indirectly, to secure their unlawful gains.

Burwell, J., files a dissenting opinion as to the validity in the hands of an innocent purchaser.

The present law is Revisal, 1951.

What is usury?—Any contrivance or device to get more interest than the law allows. *Ehringhaus v. Ford*, 25—522; *Massey v. McDowell*, 20—252; *Arrington v. Goodrich*, 95—462; *Burwell v. Burgwyn*, 100—389; *Webb v. Bishop*, 101—99. The fact of getting more than the legal rate is not

usury, unless there is device or intent to evade the law. *Elliott v. Sugg*, 115—236; *Yarborough v. Hughes*, 139—199; *Bennett v. Best*, 142—168; *Riley v. Sears*, 154—509; *Doster v. English*, 152—339; *MacRackan v. Bank*, 164—24. Where a note is endorsed to another merely for the purpose of raising money and not for a *bona fide* sale of the note, it is a loan, and more than the legal rate is usury. *Ruffin v. Armstrong*, 9—411; *McElwee v. Collins*, 20—350; *Long v. Gantley*, 20—457; *Sedbury v. Duffey*, 58—432; *People's Bank & Tr. Co. v. Fenw. Sanitarium*, 130 La., 723, 58 So., 523, 43 L. R. A. (N. S.), 211; so when this is done through an agent. *Wilkes v. Coffield*, 10—28. If A makes a valid note to B, and B endorses it to C for usurious consideration, this does not affect A's liability to C; if usurious in the beginning, it is void; a mistake in the amount is not usury. *Collier v. Nevill*, 14—30; but the creditor must show the mistake. *Dawson v. Taylor*, 28—225. The obligation to pay more than the legal rate must be absolute and not by way of penalty. *Moore v. Hylton*, 16—433. A corporation may sell its bonds *bona fide*, but not as a device to borrow money at more than the legal rate. *Comrs. v. R. R.*, 77—289. Compound interest is not allowed except in certain contracts, as in notes to guardians. *Cox v. Brookshire*, 76—314; *Scott v. Fisher*, 110—311. Interest payable annually or semi-annually is not usury. *Bledsoe v. Nixon*, 69—89; *Knight v. Braswell*, 70—709; *King v. Phillips*, 95—245. Taking interest in advance may be usury, but this may be done by law, as in case of banks. *Bank v. Hunter*, 12—100; 29 Am. & Eng. Encyc., 491. The U. S. usury law is substantially as the N. C. statute, see *Brown v. Marion Nat. Bk.*, 169 U. S., 416; *Cit. Nat. Bk. v. Gentry*, 111 Ky., 206, 63 S. W., 454, 56 L. R. A., 673.

Building and loan association contracts.—These have been examined by the court in numerous cases in regard to interest, *Mills v. B. L. A.*, 75—292; *Latham v. B. L. A.*, 77—145; *Rowland v. B. L. A.*, 115—825, 116—877; *Meroney v. B. L. A.*, 116—882; *Miller v. B. L. A.*, 118—612; *Hollowell v. B. L. A.*, 120—286; *Carter v. Life Ins. Co.*, 122—338; *Cheek v. B. L. A.*, 126—242; *B. & L. A. v. Blalock*, 160—490.

Effect of usury.—Charging more than the legal rate works a forfeiture of all interest, and accepting more than the legal rate gives the debtor the right to recover twice the amount so paid. *Smith v. B. L. A.*, 119—249; not merely twice the excess over the legal rate. *Tayloe v. Parker*, 137—418; *Ervin v. Bank*, 161—42; *Bexar B. & L. A. v. Robinson*, 78 Tex., 163, 14 S. W., 27, 9 L. R. A., 292; *Banks v. Flint*, 54 Ark., 40, 14 S. W., 769, 10 L. R. A. (N. S.), 459. Under the act of 1866 the debtor was not entitled to a set-off or counterclaim for usury, but he is under the present law. *Bank v. Lutterloh*, 81—153. The act of 1875 made usurious contracts void and authorized the recovery of double the amount paid; but if the note was valid in the beginning but a usurious contract was made for its extension, the latter only was void. *Cobb v. Morgan*, 83—213; *Wharton v. Eborn*, 88—344. In a building and loan contract it was held in 77—145 and 89—37 that a member who had paid, could not recover for usury, but a borrowing member may now recover. 120—286, 126—242. Usury must be paid in money or money's worth; a renewal of the note is not paying it. *Stedman v. Bland*, 26—296; *Godfrey v. Leigh*, 28—390; *Pritchard v. Meekins*, 98—244; *Rashly v. Bivens*, 132—273. What amounts to "charging" interest is discussed in *Grant v. Morris*, 81—160, and *Churchill v. Turnage*, 122—426; "something more must be done to the loss or detriment of the debtor than the mere presentation of an illegal claim, which is neither recognized nor paid." A security for a loan is affected by usury. *Shober v. Hauser*, 20—222; *Thorpe v. Ricks*, 21—613; and the debtor may plead usury as a defense in claim and delivery for the property. *Moore v. Woodard*, 83—531; but whether the grantee of the mortgagor would have the same right is doubtful. *Ervin v. Morris*, 137—48. The right is said to be personal. 1 Page Cont., secs. 499, 504; 54 L. R. A., 731. See also *Faison v. Grandy*, 128—p. 443; *Stuckey v. M. S. L. B. & Constr. Co.*, 61 W. Va., 74, 55 S. E., 996, 8 L. R. A. (N. S.), 814.

Where a debt extended over several years and usury had been paid on it before the defendant became liable, this does not affect defendant's liability. A judgment rendered on a debt including usury is valid. *Burwell v. Burgwyn*, 105—498; *Heggie v. B. L. A.*, 107—581; *Best v. Mortgage Co.*, 133—20. A surety is discharged by indulgence to the principal, but this must be by a valid contract; if tainted with usury it would not discharge. *Bank v. Lineberger*, 83—454. It is held that forbearance, based upon a usurious consideration paid, will discharge a surety, while a mere agreement to pay will not discharge. *Fleming v. Borden*, 127—214, 53 L. R. A., 316. It was held in *Coor v. Spicer*, 65—401, that a mortgage given to secure a usurious debt was valid in the hands of an innocent purchaser; but it is not so held now. *Faison v. Grandy*, 126—827. Action must be brought within two years; formerly it was two years after interest paid. *Pritchard v. Meekins*, 98—244; *Roberts v. Ins. Co.*, 118—429; but now it is two years from the payment of the debt, *Smith v. B. L. A.*, 119—257, or from time summons can be served. *Williams v. B. L. A.*, 131—267. Repeal of the statute does not make the debt valid. *Pond v. Horne*, 65—84; *Hughes v. Boone*, 103—137.

If the debtor sues in equity to avoid the debt on the ground of usury, he must tender the amount due with legal interest. *Taylor v. Smith*, 9—465; *Mauney v. Elliott*, 92—48; *Cook v. Patterson*, 103—127; but not so at law, *Parnell v. Vaughan*, 82—134; *Gore v. Lewis*, 109—539; *Cheek v. B. L. A.*, 127—121; *Moore v. Beaman*, 111—328; and in the same case, 112—558, it is intimated that it would not now be so in equity, but this view has not been adopted. *Churchill v. Turnage*, 122—p. 430, citing 39—449 and 100—389; *Owens v. Wright*, 161—127.

In *Oldham v. Bank*, 85—240, it was held that in a suit by a national bank, usury could not be pleaded as a set-off, but there might be a separate action for double the interest paid; but by change of law this may now be done by a counterclaim in a State court. *Morgan v. Bank*, 93—352; *Bank v. Ireland*, 122—571.

Conflict of laws.—If no place is fixed for payment, *lex loci contractus* governs; but if the place is stipulated, *lex loci solutionis* controls. *McQueen v. Burns*, 8—476; *Arrington v. Gee*, 27—590; *Davis v. Coleman*, 29—429, 33—303; *Comrs. v. R. R.*, 77—289; *Morris v. Hockaday*, 94—286; *Copeland v. Collins*, 122—619; unless it is so made to evade the usury law of this State. *Meroney v. B. L. A.*, 112—842; 116—882; *Rowland v. B. L. A.*, 115—825.

For general discussion of usury, see *Clark Cont.*, 270; 29 *Am. & Eng. Encyc.*, 453; 1 *Page Cont.*, secs. 461-505; 39 *Cyc.*, 891.

5. Gambling contracts.

1. WAGERS.

(151) GOOCH v. FAUCETT,

122 N. C., 270, 29 S. E., 362, 39 L. R. A., 835—1898.

Civil action on a note. Verdict and judgment for the defendant, and plaintiff appealed.

FAIRCLOTH, C. J. C. H. Morton and defendant agreed to have a horse race, and it was also agreed that the winner should have the other's horse. The race was run and Morton was the winner, and they valued defendant's horse at \$100, and instead of delivering the horse he gave his note to Morton for \$100. All this occurred in the State of Virginia. Subsequently the defendant re-

newed said note for principal and interest and gave the note sued on, which was assigned to plaintiff after maturity. The renewal took place in North Carolina. Without deciding whether the renewal was a North Carolina contract, we will treat it as a Virginia contract, according to plaintiff's contention.

The defendant pleads and relies on The Code, secs. 2841, 2842. These sections declare that all wagers, bets or stakes, depending upon any race, lot or chance, etc., shall be unlawful, and all contracts, etc., on account of money or property, so wagered, bet or staked, shall be void.

It does not appear whether there is any statute in Virginia denouncing betting on races as illegal. The statute law of another State is a question of fact to be proved like any other fact. In the absence of such proof, in those States, once under the jurisdiction of England, from which they severed their connection, it is presumed that the common law prevails. *Griffin v. Carter*, 40 N. C., 413; *Cade v. Davis*, 96 N. C., 139. This presumption arises from the rules of comity among the States. This is not a right of either State, but is permitted and accepted by the States from mutual interest and convenience, from a sense of the inconveniences which would otherwise result, and from a moral necessity to do justice in order that justice may be done in return. Without this rule the law of one State can have no force in another. But there is no comity among the courts of different States. They administer the law in the same way and by the same reasoning by which all other principles of the municipal law are ascertained and guided. It is the duty of every State to look to the interest of its own subjects. Comity, being voluntary and not obligatory, can not supersede all discretion on the subject. *Vattel*, at p. 61, says: "It belongs exclusively to each nation (State) to form its own judgment of what it prescribes to it—what is proper or improper for it to do, and it will examine and determine what it can do for another without neglecting the duty which it owes to itself." No State can demand the recognition of its laws in another, if they are deemed by the latter to be impolitic or unjust, of bad morals, or injurious to the rights and interests of its citizens, or against its public policy.

In *Bank of Augusta v. Earle*, 13 Pet., 519, 589, Chief Justice *Taney* said: "The courts of justice have always expounded and executed them [contracts] according to the laws of the place in which they were made, provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests."

Story on Conflict of Laws, p. 35, sec. 38, says: "In the silence of any positive rule . . . courts of justice presume the tacit adoption of them (foreign laws) by their own government, unless they are repugnant to its policy or prejudicial to its own interests."

Many other authorities to the same effect might be cited. Thrasher v. Everhart, 3 Gill Johnson (Md.), 244; Pope v. Horke, 155 Ill., 617.

There is a difference between the right and the remedy. The courts will look to the *lex loci contractus*, to construe the contract, but will not look there for the remedy. Bishop on Cont., sec. 1471 (Enlarged Ed.).

We are now to the question whether gaming, betting on horse races, etc., are contrary to public policy and injurious to the interests of the citizens of the State. If so, as we have said above, it is not obligatory on the State to recognize, nor the duty of the courts to enforce such forbidden contracts. The statute (Code, sec. 2841), having existed in force nearly a century, affords pregnant proof that our Legislature and people have considered that the acts prohibited would be dangerous to the public policy and interest of the State. "The vice aimed at is not only injurious to the person who games, but wastes his property to the injury of those dependent on him, or who are to succeed him. It has its more public aspect, for if it be announced that a trustee has been false to his trust, or a public officer has embezzled public funds, by common consent the first inquiry is whether the defaulter has been wasting his property in gambling." *Flagg v. Baldwin*, 38 N. J. Eq., 219. The habit of gaming and betting is very seductive, and when indulged in seems to seriously disturb the reason and prudence of the actors. We know as public information that many dealers in speculative stocks depending on future contingencies have found rest in insane asylums, leaving helpless families behind to be cared for by the State. In the case before us the charm for betting induced the defendant to give his note expressly "without offset," and without the "benefit of exemptions." We do not feel it to be our duty to enforce contracts fraught with such consequences and expressly forbidden by our own State law and policy, in deference to the presumed law of the *lex loci*, recognizing such contracts as valid. By the common law contracts of wager were not considered objectionable. When, however, the subject tended to encourage acts contrary to sound morals, the courts refused to enforce such contract. *Gilber v. Sykes*, 16 East, 150. And when the act was against public policy or public duty the court withheld its hand. *Atherford v. Beard*, 2 T. R., 610.

The case of *Flagg v. Baldwin*, *supra*, is one in point. The contract for speculation in stocks upon margins was executed in the

State of New York, where it was presumed to be lawful and enforceable, and it was sought to be enforced in the courts of the State of New Jersey. The statute in the latter State is in substance and almost *verbatim* the same as ours. The subject is thoroughly and ably considered in the opinion, and it was held that such contracts could not be enforced in New Jersey, because it would violate the plain public policy of the State on the subject of gambling and betting, and the court said: "In this respect, such contracts are excepted from the rule of comity which requires the enforcement by the courts of one State of contracts made in another, if valid by the *lex loci contractus*." Such contracts as we have before us are unlawful and void, and are beyond the protection of the law or the right of appeal to courts of justice. This court respects the usury laws of other States, but there is no likeness between our statutes forbidding usury and gaming, betting, etc. The former only affects the individual, for his benefit and protection, and the statute does not avoid the contract, but only forfeits the interest.

We have examined the case of *Scott v. Duffy*, 14 Pa. St. Rep., 18, and find it does not apply here. The defendant in error loaned the plaintiff money in Jersey to bet on an election and he recovered it in a Pennsylvania court. The court said the loan did not arise out of the bet or any bet, nor to carry any specific bet into execution. The loan was independent of and before any bet was made. The lender neither played nor bet. Honor and good faith required that it should be repaid, and it did not appear that any statute in either State prevented it. Affirmed.

See Revisal, 1687. In the early reports are several cases in which such contracts were held to be valid, as in 1—29, 521, 545, 553; 2—502; 3—161, 171, 178, 354, 362, 403; 4—107, 250; 5—22, 33, 37, 137; 6—26, 117. In accord with the principal case, *Warden v. Plummer*, 40—524; *Teague v. Perry*, 64—39; *Calvert v. Williams*, 64—168. What is a game of chance is discussed by Ruffin, C. J., in *State v. Gupton*, 30—271, in which it is held that "tenpins" is not a game of chance so as to be indictable, but a contract based upon such gaming would be void. See also *State v. King*, 113—631. "Raffling" a turkey is a game of chance, but "shooting" for one is not, neither is "progressive euchre." *State v. Deboy*, 117—702. Betting on such games would probably be within the statute. See Revisal, 3715.

"Bohemian oats" contracts, in which the seller agreed to sell a certain number of bushels for the purchaser at an exorbitant price, was held to be void as a gambling contract, or as tending to defraud some one. 15 Am. & Eng. Encyc., 944, and note; 14 *Ibid.*, 615; *McNamara v. Gargett*, 68 Mich., 454, 36 N. W., 218, 13 A. S. R., 355; *Schmueckle v. Waters*, 125 Ind., 265, 25 N. E., 281.

On gambling contracts generally, see 14 Am. & Eng. Encyc., 581 *et seq.*; *Clark Cont.*, 275; 1 Page Cont., secs. 448-454; *Da Costa v. Jones*, *Cowper*, 729, 12 E. R. C., 377; *Bernard v. Taylor*, 23 Ore., 416, 37 A. S. R., 701, 18 L. R. A., 861; 20 Cyc., 921; 6 R. C. L., 775.

2. INSURANCE CONTRACTS.

(152) BURBAGE v. WINDLEY,

108 N. C., 357, 12 S. E., 839, 12 L. R. A., 409—1891.

Civil action to recover the sum of \$500 on an insurance contract. The defendant appealed from a judgment in the court below, and in this court moved to dismiss the action on the ground that the complaint does not state a cause of action.

MERRIMON, C. J. In this and like actions where the contract or promise sued upon is by parol, a sufficient consideration should be alleged in the complaint to support the contract or promise. This is essential, because otherwise no cause of action is alleged or appears in the pleadings. In some cases—such as where the cause of action is a bill of exchange or a promissory note, and some other legal liabilities—the mere statement of the liability which constitutes the consideration is sufficient. In these cases the nature of the liability itself sued upon implies the consideration; but in all other cases of simple contract it is necessary that the complaint should disclose a sufficient valuable consideration, whatever that may be. Moreover, the consideration alleged must be lawful and not in its nature, because of some tainting or vitiating quality in it, void. *Moore v. Hobbs*, 79 N. C., 535; *Burnett v. Besso*, 4 John., 235; 1 Chitty Pl., 294.

There are cases where a cause of action is imperfectly alleged in the complaint; this pleading may be helped by admissions in the answer, but this is not one of them. Indeed, there is no admission in the answer that, in any view of the allegations of the complaint, would help them at all. Hence, it appears from the complaint itself—the allegations of the supposed cause of action—that the only consideration alleged or relied upon is, as we shall presently see, unlawful and void as such. In other words, it appears from the complaint that there is no consideration to support the promise to pay the sum of money for which the plaintiffs demanded judgment.

The complaint itself discloses the material facts that R. C. Windley, the testator of defendants, in his lifetime, procured three policies of insurance, each purporting to insure the life of John W. Hammond, the former husband of the *feme* plaintiff, for a sum of money specified therein, the three sums aggregating \$10,000—Windley, in consideration of permission given him by Hammond to so insure the latter's life, agreeing to pay of the money he might realize from such insurance \$500 to the *feme* plaintiff. It is not alleged that Windley had any insurable interest in the life

of Hammond. On the contrary, it appears by implication, if this is not expressly alleged, that he had none. It is alleged "that the consideration, and the only consideration, which induced and moved the said John W. Hammond to permit Mr. Windley to have his life insured, was that the said Windley contracted and agreed with said John W. Hammond and his wife, Sarah E. Hammond that out of the money which the said Windley would collect on these policies and certificates of insurance upon the life of said Hammond after his, the said Hammond's death, he, Windley, would pay to Sarah E. Hammond Burbage, the sum of \$500."

It thus clearly appears that the purpose of Windley, with the knowledge, consent and cooperation of Hammond, was to insure the latter's life, in which he had no insurable interest, for his own benefit. He simply promised to pay the *feme* plaintiff of the money he might realize after the death of her husband \$500, expecting to realize \$9,500 for himself, less such premiums on the insurance as he might pay.

As the assured had no insurable interest in the life of the *cestui que vie*, the contract was simply a wager—it was not founded upon any just and lawful consideration—it was a mere gambling speculation. The assured was not to be indemnified against loss, injury or disadvantage in any respect growing out of the life he insured; the insurance was not intended to serve any legitimate business purpose or end—it was purely a matter of speculation founded upon nothing but hazard.

Such contracts and speculations are wholly unnecessary; they can not serve or promote any useful and wholesome purposes of individuals, society or government. They do not stimulate, promote or encourage industry, enterprise, legitimate business, sound morality, or increase the wealth of the people or the strength and power of the State. On the contrary, their nature and uniform experience go to show that they represent nothing substantial or valuable, or of practical advantage to persons or communities. They strongly tend to demoralize society and embarrass industries and general business. In their very nature they stimulate, afford incentives to, and encourage those who become parties to them to resort to sinister, oftentimes criminal, means to turn or end the hazard in their favor, and thus gain unjust and dishonest advantage. They encourage men to engage in the business of speculation in hazards not necessary nor useful in the general purposes and business of life, but which is positively and seriously injurious to them. Such contracts and speculations contravene the justice and policy of the law—they are *contra bonos mores*, and are therefore void.

While there is no decision of this court directly in point here, it

is well settled by a multitude of uniform decisions that all contracts against the policy of the law, and such as contravene sound morality, are on such account void. We cite a few of many cases. *Sharp v. Farmer*, 20 N. C., 255; *Blythe v. Lovinggood*, 24 N. C., 20; *Ingram v. Ingram*, 49 N. C., 188; *King v. Winants*, 71 N. C. 469; *Williams v. Carr*, 80 N. C., 295; *Griffin v. Hasty*, 94 N. C., 438.

In *Shepherd v. Sawyer*, 6 N. C., 26, the court held that when "A agrees with B for 2½ percent premium paid down to insure a negro slave reported to be lost in Pasquotank River; B has no interest in the negro, yet his loss being proved, B is entitled to recover his value." This decision is placed upon the ground that it was an "innocent wager," and that such wagers were sanctioned by the common law. The opinion of the court is very brief, and no authority is cited to show that it was "innocent," nor is any reason stated why it was such wager. If the court intended that the case should have general application to wagers in insurance, embracing cases like the present one, we can not hesitate to say, in the absence of reasons stated in support of it, that, in our judgment, it is not sustained by the greater weight of reason or the greater weight of authority, certainly at the present day. *Ruse v. Ins. Co.*, 23 N. Y., 516; *Lord v. Dall*, 12 Mass., 115; *Ins. Co. v. Hazzard*, 41 Ind., 116; *Cormack v. Lewis*, 15 Wall., 643; *Ins. Co. v. France*, 14 U. S., 561; *Womack v. Davis*, 104 U. S., 775; *Bliss on Ins.*, sec. 9.

The consideration of the contract or promise sued upon here, as expressly alleged, was the permission granted to the testator of the defendant by the former husband of the *feme* plaintiff, Hammond, to insure the latter's life. If such permission, in any case or connection, be a valuable privilege or advantage, in this case, it was granted with the view and for the purpose of enabling and helping Windley to make an unlawful contract—a wager—on the life of Hammond. Thus the latter became connected with and intended to share in the wagering transaction. The promise to pay \$500 to the *feme* plaintiff was expressly based upon and grew out of it; it was, as to Hammond and his wife, part of it. It partook of the wager—the vicious nature of the contract of insurance. Such consideration was, therefore, void. Hence, the promise founded upon it was without legal sanction and of no binding effect in contemplation of law. *Ex turpi causa non oritur actio*. *Duke v. Asbee*, 33 N. C., 112; *Bettis v. Reynolds*, 34 N. C., 344; *Covington v. Threadgill*, 88 N. C., 186; *Griffin v. Hasty*, 94 N. C., 438.

If, in good faith, the purpose had been to insure the life of Hammond for the benefit of his wife, the case, as to her, might have been very different. But, as we have seen, this was not the

purpose or any part of it. The insurance was for the benefit of Windley; the policies were granted to and made payable to him; he promised to pay the small sum mentioned to the *feme* plaintiff for permission to insure the life.

As, therefore, it appears from the complaint that no cause of action is alleged, the motion to dismiss the action must be allowed.

Dismissed.

Such a contract will not be sustained, though made for a benevolent object. *College v. Ins. Co.*, 113—245. "Insurable interest" is where there are ties of blood or marriage, or the existence of some contract relation, the fulfillment of which death would prevent. *Ibid.* *Hinton v. Ins. Co.*, 135—314. In *Albert v. Ins. Co.*, 122—92, the beneficiary had no insurable interest, but the insured paid the premiums; *Pollock v. Household of Ruth*, 150—211; *Hardy v. Insurance Co.*, 152—286; a creditor may insure the life of his debtor, *Maynard v. Ins. Co.*, 132—711; a corporation may insure the life of its president, *Victor v. Mills*, 148—107; *Victor v. Manfg. Co.*, 148—119; *Revisal*, 1128, amended 1909, ch. 507; in *Powell v. Dewey*, 123—103, a simple partnership, with no capital invested and no indebtedness, did not give one an insurable interest in the life of the other. An equitable title to property is an insurable interest. *Grabbs v. Ins. Co.*, 125—389; *Clapp v. Ins. Co.*, 126—388; *Strause v. Ins. Co.*, 128—64; *Ger-ringer v. Ins. Co.*, 133—407.

See 3 Am. & Eng. Encyc., 929 *et seq.*; 1 Page Cont., secs. 383-394; Clark Cont., 277; 25 Cyc., 703; 6 R. C. L., 779.

3. DEALING IN FUTURES.

(153) GARSEED v. STERNBERGER,

135 N. C., 501, 47 S. E., 603—1904.

CLARK, C. J. The defendant, desiring to engage in buying cotton "futures" without being known, requested the plaintiff to buy them for him through the plaintiff's own brokers in New York. Both plaintiff and defendant lived in Greensboro, N. C. The defendant agreed to furnish all the money necessary for these transactions and to guarantee the plaintiff against loss. Several of these transactions occurred, the defendant using the plaintiff's name with his consent and the orders being sent direct by the defendant to the plaintiff's brokers. After several such transactions, in this particular one the defendant gave the plaintiff a check for \$500, and told him he was going to buy 500 bales "June cotton." The defendant sent his instruction direct to the plaintiff's brokers. There was a loss of \$626.28 on this contract being closed out, which the New York brokers charged up to the plaintiff. The plaintiff thereupon called upon the defendant to reimburse him the amount (\$126.28) in excess of the sum of \$500, which had been handed him by the defendant. The defendant did not, after the loss, request the plaintiff to pay the \$126.28, nor promise after such loss to reimburse the plaintiff, but, on the con-

trary, denied liability, alleging that the loss was caused by the failure of the plaintiff's brokers to obey instructions. The plaintiff began this action before a Justice of the Peace to recover the said sum of \$126.28 as money paid to defendant's use. The defendant pleaded that, the transaction being illegal, the plaintiff could not recover. Upon the plaintiff's testimony as above the defendant demurred to the evidence. The court sustained the demurrer and dismissed the action. In this there was no error.

In Clark on Contracts, 501, it is said: "If a broker or other agent is employed to carry out an illegal transaction, and is privy to the unlawful design, and by virtue of his employment performs services, makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal,—citing *Greenhood Pub. Pol.*, 110 (where the cases are collected): *Harvey v. Merrill*, 150 Mass., 1, 5 L. R. A., 200; 15 Am. St. Rep., 159; *Gibbs v. Gas Co.*, 130 U. S., 396, and numerous other cases; saying further: "Not only is this true, but it has been held that any express promise made by the principal to reimburse him is void," citing *Embrey v. Jemison*, 131 U. S., 336; *Kahn v. Walton*, 46 Ohio St., 195; *Everingham v. Meignan*, 55 Wis., 354, which sustain the text. But if there could be any doubt on this proposition, our chapter 221, Laws 1889, "to suppress and prevent certain kinds of vicious contracts," puts the matter beyond controversy. Section 1 is very elaborate and forbids all classes and kinds of dealings in "future" contracts, in which, as in this case, the transaction is not a *bona fide* purchase of commodities for actual future delivery, but contemplates a payment or receipt of the difference in the price at the time of delivery from that named in the contract, and provides that no party "or agent of such party, directly or remotely connected with such contract in any way whatever, shall have or maintain any cause of action on account of any money or other thing of value paid, advanced or hypothecated by him, in connection with or on account of such contract or agency."

Section 3 provides that every person, who is a party to any such contract, "and every person who shall be the agent, directly or indirectly, of any such person in making, or furthering, or effectuating the same . . . shall be deemed guilty of a misdemeanor, and on conviction in the Superior Court shall be fined not less than \$100 nor more than \$500, and may be imprisoned, in the discretion of the court." And section 4 visits with like punishment every person who in this State shall "do any act or aid in any way in this State in the making or furthering such a contract so made in another State."

No error.

Revisal, 1689-1691, 3823-3826. Where A lends money to B to pay losses incurred by speculating in futures, he can not recover if he is directly or indirectly connected with the speculation. *Ballard v. Green*, 118—390. If

the real meaning of the contract is a bet on the price, and no actual sale or purchase is intended, the contract is illegal; but the intent must be common to both buyer and seller. *Williams v. Carr*, 80—294; *Cantwell v. Boykin*, 127—64; *Rankin v. Mitchem*, 141—282; *Burns v. Tomlinson*, 147—634, 645; *Edgerton v. Edgerton*, 153—167; *Harvey v. Pettaway*, 156—375; *Rodgers v. Bell*, 156—378; *Sprunt v. May*, 156—388; *Holt v. Wellons*, 163—124; *Burns v. Whitcover*, 158—384; *Carpenter v. Hanes*, 167—551.

“Dealing in futures” is merely speculation on the rise and fall of prices. A “bucket-shop” is an establishment, nominally for the transaction of stock exchange business, or business of similar character, but really for the registration of bets or wagers, usually for small amounts, on the rise and fall of prices, no transfer or delivery being intended. *State v. McGinnas*, 138—724; *State v. Clayton*, 138—732.

See generally, 14 *Am. & Eng. Encyc.*, 604 *et seq.*; *Clark Cont.*, 278; 1 *Page Cont.*, secs. 448-454; *Preston v. Cin.*, *Col. & H. V. R. R.*, 36 *Fed.* 54, 1 *L. R. A.*, 140; *Duchemin v. Kendall*, 149 *Mass.*, 171, 21 *N. E.*, 242, 3 *L. R. A.*, 784; *Crawford v. Spencer*, 92 *Mo.*, 498, 1 *A. S. R.*, 753; 20 *Cyc.*, 926; 6 *R. C. L.*, 780.

Lotteries and gift enterprises.—*Revisal*, 3725, 3726, 3727. A lottery is a species of gambling and is indictable. *State v. Bryant*, 74—207; defined in *State v. Lumsden*, 89—572, and *State v. Deboy*, 117—702. Gift enterprise, *Winston v. Beeson*, 135—p. 279. 14 *Am. & Eng. Encyc.*, 600-603, 1005; *State v. Perry*, 154—616; *State v. Lipkin*, — *N. C.*, —, 84 *S. E.*, 340; *Minton v. Smith Piano Co.*, 36 *App. D. C.*, 137, 33 *L. R. A. (N. S.)*, 305; 6 *R. C. L.*, 779.

Sec. 3. Agreements contrary to public policy.

1. As to public offices.

(154) BASKET v. MOSS,

115 *N. C.*, 448, 20 *S. E.*, 733, 44 *A. S. R.*, 463, 48 *L. R. A.*, 842—1894.

Application for an injunction to restrain a sale under a mortgage. The defendant was postmaster at Henderson, in 1893, and term would expire in March, 1894. The plaintiff, wanting the office, agreed to pay the defendant the sum of \$972.50 to resign in his favor for the unexpired term and to go to Washington and induce the President to appoint the plaintiff to this office. The said sum included the estimated salary and clerk hire for the unexpired term, \$160 for expenses to Washington, and a debt of \$37.50. The whole was evidenced by bond secured by mortgage on land. The plaintiff did not get the office, and the defendant is preparing to sell under the mortgage to pay the amount for expenses and the \$37.50. Jos. B., a coplaintiff, also claimed an interest in the land. The Judge continued the restraining order until the hearing, and the defendant appealed.

CLARK, J. The public has a right to some better test of the capacity of their servants than the fact that they possess the means of purchasing their offices. The Code, sec. 1871, provides, “All bargains, bonds and assurances made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law,

shall be void." Notwithstanding the office is an office under the United States government, if an action were brought in our courts to recover upon a bond or mortgage given for such consideration, our courts would hold it void. Such agreements are void at common law, as well as by statute. So also contracts to procure appointments to office are void (Mechem on Public Offices, sec. 351); or to resign office in another's favor. *Ibid.*, sec. 357; Mechem v. Dow, 32 Vt., 721; Gracone v. Wroughton, 11 Exch., 146. Public offices are public trusts, and should be conferred solely upon considerations of ability, integrity, fidelity and fitness for the position. Agreements for compensation to procure these tend directly and necessarily to lower the character of the appointments, to the great detriment of the public. Hence, such agreements, of whatever nature, have always been held void as being against public policy. Maguire v. Comine, 101 U. S., 108; Tool Co. v. Norris, 2 Wall., 45; Gray v. Hook, 4 N. Y., 449; Gaston v. Drake, 33 Am. Rep., 548; Filson v. Himes, 47 Am. Dec., 422; Faurie v. Morin, 4 Martin (La.), 39; Liness v. Hessing, 92 Am. Dec., 153. Says Ames, C. J., in Eddy v. Capron, 67 Am. Dec., 541, "By the theory of our government, appointments to office are presumed to be made solely upon the principle *detur digniori*, and any practice whereby the bare consideration of money is brought to bear in any form upon such appointments to or resignation of office, conflicts with and degrades this great principle. The services performed under such appointments are paid for by salary or fees, presumed to be adjusted at the point of adequate remuneration only. Any premium paid to obtain office interferes with this adjustment and tempts to speculation, overcharges and frauds in the effort to restore the balance thus disturbed." Besides, the moral sense revolts at traffic to any extent in the bestowal of public office. It is against good morals as well as against the soundest principles of public policy. If public offices can be sold or procured for money, the purchasers will be sure to reimburse themselves by dispensing the functions of their offices for pecuniary consideration. The law wisely guards against the first step in that direction. For that reason, not only the sum agreed to be paid directly to the holder of this office to resign, but the amounts advanced for expenses and compensation of persons to go to Washington to procure the authorities there to accept the resignation of the one party and the appointment of the other, are not recoverable. For the same reason that agreements to pay for lobbying the passage of bills before a legislative body are void (Lawson on Contracts, sec. 309, and Mechem on Offices, sec. 360, and cases cited), all agreements for expenses and compensation of persons seeking to influence or procure appointments to office are void. Lawson, *supra*, sec. 310:

"The courts condemn the very appearance of evil, and it matters not that in a particular case nothing improper was done or expected to be done. It is enough that the employment tends directly to such results." *Clippinger v. Hebaugh*, 40 Am. Dec., 519; *Wood v. McCann*, 6 Dana (Ky.), 366; *Mills v. Mills*, 100 Am. Dec., 535, and numerous other cases cited in notes to *Mechem* on Officers, sec. 360; *Lawson*, *supra*, sec. 311 and cases cited.

If an action had been brought to recover these sums or to foreclose a mortgage given to secure payment thereof, the court would dismiss the action. The defendant contends, however, that as he was careful to take a mortgage with a power of sale, the courts will not interfere by injunction, but will let him proceed to collect his ill-gotten gains. This would simply legalize the practice which is denounced both by statute and common law. Reasons of public policy forbidding this species of corruption are too profound and too important to the public welfare to be evaded and nullified by so simple a device. A mortgage given to secure a sum of money upon an agreement against public policy is void. *The Code*, sec. 1871; *Teal v. Walker*, 111 U. S., 252; *Wildey v. Collier*, 7 Md., 275; *Crowder v. Reed*, 80 Ind., 1. The sale under a void mortgage would be a cloud on the title, and an injunction lies, especially when the invalidity does not appear upon the face of the mortgage, but requires extrinsic evidence to prove it. 1 *High on Injunc.*, sec. 469; *Yager v. Murkle*, 26 Minn., 429. In cases where the consideration is immoral, the deed will be set aside. 2 *Addison Cont.*, 716.

Pomeroy Eq. Jur., secs. 939, 940, 941, 942, calls attention to the fact that the rule *in pari delicto* is often misunderstood, and its application is properly and correctly that in such cases "*potior est conditio possidentis*"—that is, that the court will permit nothing to be done which will enable a party to collect from the other the fruits of his wrong. When he sues to recover, the law will not give him judgment. When he has shrewdly attempted to evade this by taking a mortgage with a power of sale, the court will by injunction prevent his collecting on a mortgage denounced as void by reasons of public policy. In sec. 941 he says: "Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then, relief is given to him. In pursuance of this high principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance or transfer, and decree the recovery back of money paid or property delivered in performance of the agreement." Also, in section 940, he says that whenever

the defensive remedy at law will not be equally certain, perfect and adequate, the equitable remedy will be granted by injunction and the like. "The equitable relief so conferred does not violate the general maxim concerning parties *in pari delicto*; on the contrary, it carries that maxim into effect." So in the present case, the injunction against sale under the void mortgage taken against public policy, enforces that maxim by prosecuting [preventing] either party recovering anything from the other. This is also the well-settled rule in England. In *Lloyd v. Gordon*, 2 Swan, 181, Lord Eldon granted an injunction to restrain the negotiation of bills of exchange which were made void by statute, 9 Anne, c. 14, which is in the very tenor of sec. 1871 of The Code, applicable to the present transaction. Lord Hardwicke granted the injunctive relief in a similar case, *Smith v. Aykwell*, 3 Atkins, 566, and the Vice-Chancellor in *Earl of Milltown v. Stewart*, 3 Simons, 371, which was affirmed by Lord Cottenham, 3 M. and C., 18.

In such case, before the Master of the Rolls, Sir John Romilly, where part of the consideration was for money loaned, and part was for an immoral consideration, the whole mortgage was ordered to be canceled, the court declining to pass upon the question whether the mortgagee could recover at law for the valid part of the consideration—*i. e.*, the money loaned. *Willyams v. Bullmore*, 33 L. J. R. (Eq.), N. S., 461. In the present case, upon the defendant's own showing, \$37.50 is the only valid part of the sum attempted to be secured. Whether the mortgage can be upheld to that extent is not before us, as the plaintiff in his reply expresses his willingness to pay said sum. The plaintiff recovering judgment for the cancellation of the mortgage, the defendant should be taxed with the costs. The injunction was properly continued to the hearing. Affirmed.

Shepherd, C. J., files a concurring opinion in the result, but holds that the plaintiff, mortgagor, is *in pari delicto*.

A sheriff or clerk may appoint a deputy, but can not "farm out" his office or any portion of it. *Cansler v. Penland*, 125—578, 126—793; *Haralson v. Dickens*, 4—163. Revisal, 2366, 3571; 15 Am. & Eng. Encyc., 964-968; 1 Page Cont., secs. 410, 411, 412; 9 Cyc., 495; Clark Cont., 282 *et seq.*; 16 A. D., 506, note; 6 R. C. L., 736.

Pensions.—An agreement by a widow, entitled to a pension, to pay an agent part of it for trouble in getting it, is void, being prohibited by statute 1848. *Powell v. Jennings*, 48—547; *Mosby v. Hunter*, 31—119; so an assignment of a pension before due is void. *Gill v. Dixon*, 131—87. See also 22 Am. & Eng. Encyc., 664, 669.

(155) KING v. RAILROAD,

147 N. C., 263, 60 S. E., 1133—1908.

The plaintiff was the editor of a newspaper, and the defendant company was trying to secure aid in building a line of railroad; an agreement was made between the plaintiff and the defendant that the plaintiff should use the columns of his paper to promote the carrying of elections along the proposed route, and that he should be "taken care of," and well paid for his service; the plaintiff performed his part of the contract by publishing advertisements, editorials, etc., and by personal services at elections; the defendant refused to pay, and plaintiff brought suit. The action was dismissed, and plaintiff appealed. Affirmed.

CLARK, C. J. . . . When an advertisement is inserted the public knows that it is paid for, that it speaks for the advertiser and that the representations are made by him and not by the editor. But an editorial is understood to express the true and unbought views of the editor. It is because of that fact that they carry any weight with the public. It was precisely because of such weight that the defendant thought it worth money to buy the use of plaintiff's editorial columns. Had the plaintiff informed the public that he had sold his editorial columns to the railroad company, his editorials would have had no weight whatever in inducing the citizens to vote a bond issue on themselves in favor of the railroad. Both parties knew this. Both are at fault. Public policy will not permit the courts to enforce a contract based upon an immoral consideration, but will leave the parties to their own devices. *Basket v. Moss*, 115 N. C., 448, 44 A. S. R., 463, 48 L. R. A., 842; *Burbage v. Windley*, 108 N. C., 357, 12 L. R. A., 409, and many other cases cited, 135 N. C., at pp. 733, 734. Neither the sale of editorial columns nor services for carrying an election are recognizable in a court of justice as ground of action for a recovery of compensation.

Contracts, for money or personal profit, to use efforts and influence to "carry an election," especially an election of this character, are *contra bonos mores*. 9 Cyc., 500; *Wilson v. Puryear*, 12 Ky., 556; 15 A. & E., 984; *Dean v. Clark*, 80 Hun, 80. In *Trist v. Child*, 88 U. S., 449, there is citation of numerous authorities which have refused to uphold contracts alleged in the complaint, because they are held to be against the policy of the law and the theory upon which the government of this republic is founded.

The plaintiff in this case was the editor of a paper and is seeking to recover for sale of his editorial influence and for other alleged services in carrying an election to issue bonds. Certainly

this was as much against public policy as an agreement for a consideration not to bid on articles to be sold by the government, or an agreement to pay for a contract to carry the mail, or an agreement to pay for procuring signatures to a pardon to be presented to the Governor, or an agreement not to bid at a sale made under the judicial order, or an agreement to pay for promoting a marriage; because in each of the several instances mentioned, which have all been held to be invalid by reason of public policy, the interests affected are private and largely bear upon individuals rather than upon a community, while in this case the interests affected are public and bear, if the burden should be placed, upon the whole community.

There are other services mentioned in the complaint, but they are all stated in the same cause of action and so mixed up with it as to poison the whole. *Trist v. Child*, 88 U. S., 441. It is probable that the whole employment was based upon the influence of the newspaper and its editorials. Certainly the defendant's demurrer *ore tenus* to the action should have been sustained below, and it must be sustained here.

Lobbying contracts.—All contracts for legitimate professional services for a fixed compensation are enforced, while those for a contingent fee or which require personal influence, personal solicitation, or any trickery or underhand means to secure legislation, are void. 30 L. R. A., 737; 33 L. R. A., 166; 42 L. R. A., 347; 48 L. R. A., 294; 62 L. R. A., 362; *Clark Cont.*, 285; 15 Am. & Eng. Encyc., 969; 9 Cyc., 486; 1 Page Cont., secs. 327-334; 6 R. C. L., 730.

Elections.—A person who before or on the day of election furnished liquor, with the belief that it was to be used to influence the electors, can not recover for the price. *Duke v. Asbee*, 33—112. See *Revisal*, 3386, 3387, 3389. A note given for money lost on an election bet is void, even though neither party was a voter. *Bettis v. Reynolds*, 34—344. *Revisal*, 3384.

See generally, 1 Page Cont., secs. 409, 413, 414; 15 Am. & Eng. Encyc., 983.

2. Municipal and other corporations owing a duty to the public.

(156) EDWARDS v. GOLDSBORO,

141 N. C., 60, 53 S. E., 652, 4 L. R. A. (N. S.), 589, 8 Ann. Cas., 479—1906.

Civil action for money paid. The city of Goldsboro was authorized to build a city hall and a markethouse, and the plaintiff paid the sum of \$600 for the purpose of having the said buildings located near his property, to enhance the value of the same; the defendant built the city hall as agreed, but refused to erect the markethouse, and plaintiff brought this action to recover the money paid. It appeared that the plaintiff's property was enhanced to the amount paid. There was a judgment for the defendant, and plaintiff appealed.

WALKER, J. (After discussing the preliminary questions as to issues submitted):

The case naturally resolves itself into two questions, which require discussion: First, was the contract against public policy, or based upon an illegal consideration, and therefore void? Second, the plaintiff being a party to the illegal transaction, if it was illegal, is he in a position to ask for a return of the money, or is he debarred of a recovery, being *in pari delicto*?

The statute provides that the authorities of a town, whether commissioners or aldermen, shall make such orders for the disposition or use of its property as the interest of the town may require. Revisal, sec. 2916. Judge Dillon, referring to the general duty of municipal officers, with respect to the affairs which they have in charge, says: "Powers are conferred upon municipal corporations for public purposes; and as their legislative powers can not, as we have just seen, be delegated, so they can not without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass bylaws which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties. The cases cited mark the scope and illustrate the application of this salutary principle in a great variety of circumstances, and, for the protection of the citizen, it is of the first importance that it shall be maintained by the courts in its full extent and vigor." 1 Dillon Mun. Corp. (4 Ed.), sec. 97. It will be seen, therefore, that public office in a city is a public trust to be administered for the equal benefit and advantage of all the citizens of the municipality, and the governing body will not be permitted to contract at any time so as to deprive itself of the free exercise of its judgment and discretion in providing for what may afterwards turn out to be the best interest of all citizens alike, and especially will it not be allowed by an obligatory agreement to discriminate in favor of one citizen or class of citizens as against another entitled to equality of privilege and benefit, even for a valuable consideration. It must at all times retain freedom of judgment, so that its decisions will be influenced only by a regard for the public welfare. We take it that any contract by which it should be attempted to prevent the city authorities from deciding impartially on a matter affecting the general welfare would be unenforceable. If public trustees or officers may by contract divest themselves of any portion of the essential powers entrusted to them, they may just as well alienate all of them, though by degrees, and thus eventually abdicate the exercise of every governmental function. Such agreements are therefore con-

trary to the true principles upon which society is founded and subversive of all well-regulated government. These propositions would seem to be self-evident. "All agreements for pecuniary considerations, to control the business operations of the government, or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Tool Co. v. Norris*, 2 Wall., 45; *Cameron v. McFarland*, 4 N. C., 299; *Wharton on Cont.*, sec. 403. The leading case of *Martin v. Mayor*, 1 Hill (N. Y.), 546, is one in which the principle was applied and where it appeared that for a consideration, public trustees agreed with a lot owner to make certain improvements which they refused to do. The court held that they might decline to go forward with the improvement on the ground that it was injurious or unprofitable to the public, and that in this respect they enjoyed a discretion which individuals have no power to control and the trustees no power to part with. It was further said: "To allow that commissioners of streets and highways may bind themselves by contract to subserve the interests of individuals, would be a clear violation of public policy. They are officers of municipal corporations or *quasi* corporations, and in respect to the laying out of streets and highways are primarily bound to consult the interests of the community at large." The doctrine there enforced was that a contract will not be sustained which tends to restrain or control the judgment of public officers, which must always be impartial. But all promises of individuals to pay a portion of the expenses of public improvements do not necessarily fall within the principle and may not be void. The validity of the particular contract will depend, of course, upon whether it has the evil tendency to influence the officer in the discharge of his public duty by trammeling his judgment in matters about which he should be left free to act as the public interest alone may dictate or require. This is the vitiating element, and if the agreement has that tendency in the eye of the law, it makes no difference what is the actual motive in the particular instance or how pure it may be. (The decision here cites and quotes from *W. S. E. Society v. Philadelphia*, 31 Pa. St., 175; *Gale v. Kalamazoo*, 23 Mich., 344, *Cooley*, C. J.; *Fuller v. Dame*, 35 Mass., 372; *Ingersoll on Pub. Corp.*, 310; 2 *Dillon Mun. Corp.* (4 Ed.), sec. 685; *Louisville City Railway v. Louisville*, 71 Ky., 417; *Gas Co. v. Columbus*, 5 Ohio St., 65; *New Haven v. R. R.*, 62 Conn., 257; *Indianapolis v. Gas Co.*, 66 Ind., 404; *McKeesport v. R. R.*, 2

Penn. Sup., 242; *Milhau v. Sharp*, 27 N. Y., 611; *Matthews v. Alexander*, 68 Mo., 119; *Mayor v. Bowman*, 39 Miss., 682.) The question has frequently arisen in the establishment of railroad depots. Railway companies are *quasi* public corporations, and it has been said that the public have an interest in the location of their depots, the public convenience and accommodation being involved. "It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points and in such manner as to subserve the public necessities and convenience, that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void." *People v. Railway*, 130 Ill., 175. "It seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point, are void as against public policy." *Railroad v. State*, 31 Fla., 508. Cases and text-books to the same effect can be cited **numerously**. We give only a few of them. *R. R. v. Ryan*, 11 Kans., 602; *R. R. v. Seely*, 45 Mo., 212; *R. R. v. People*, 132 Ill., 559; *R. R. v. Marshall*, 136 U. S., 393; *Holladay v. Patterson*, 5 Ore., 177; *Greenhood on Pub. Pol.*, 319; 2 *Beach Mod. Law of Cont.*, sec. 1517.

(That the contract is illegal, the decision further cites *Woodman v. Innes*, 27 Am. St. Rep., 274; *Elkhart Co. Lodge v. Crary*, 49 Am. Rep., 746; *Glenn v. Commrs.*, 139 N. C., 412; *Bridge Co. v. Comrs.*, 81 N. C., 491.)

This brings us to the consideration of the next question, whether the contract being void as founded upon an illegal consideration, the plaintiff can recover the money he has paid in part execution of the same. With reference to this subject certain rules may be taken as settled. The law gives no action to a party upon an illegal contract, either to enforce it directly or to recover back money paid on it after it has been executed. *Webb v. Fulchire*, 25 N. C., 485; *Warden v. Plummer*, 49 N. C., 524; 15 Am. & Eng. Enc. (2 Ed.), 997. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. The maxim is *ex dolo malo* (or *ex turpi causa*) *non oritur actio*, and the kindred one is *in pari delicto potior est conditio defendentis*. In such cases the law leaves the parties where it finds them. When parties are *in pari delicto* in respect to an illegal contract, and one obtains advantage over the other, a court will not grant relief (*Wright v. Cain*, 93 N. C., 296), and when they have united in an unlawful transaction to injure another or others or the public, or to defeat the due administration of the law, or when the contract is against public policy,

or *contra bonos mores*, the courts will not enforce it in favor of either party. *York v. Merritt*, 77 N. C., 213; *Ibid.*, 80 N. C., 285; *King v. Winants*, 71 N. C., 469; *Pinckston v. Brown*, 56 N. C., 494; *Sparks v. Sparks*, 94 N. C., 532. Chief Justice *Smith* said for the court in the last case: "But the principle is that such an agreement will not be enforced at the instance of either party, not that what may have been done in carrying out its purpose will be undone by the court. It will not assist when its aid is asked, or in other words, its provisions 'will not be enforced in this court'—a court exercising equitable functions. The rule that refuses to compel the execution of such a contract, for similar reasons, refuses to relieve from the consequences of what the parties have done under it, in giving it full effect." The rule is departed from when there is inequality of condition as between the parties, or one of them has come under the subjection of the other, or has been induced by oppression, imposition, undue influence or improper means, to make the contract, in which case he is not equally at fault with the other party. While *in delicto*, he is not *in pari delicto*, but stands, as it were, *in vinculis*. *Pinckston v. Brown*, *supra*; 15 A. & Eng. Enc., 1004. When the contract is executory, the court will not enforce it, and when executed, will not set it aside as against one party at the instance of the other. We need not decide nor inquire whether, when money is paid on an illegal contract, the aid of the court can be successfully invoked for its recovery, though the other party refuses to perform any part of the agreement, so that it is wholly executory on his side. There is a conflict of authority upon this question. *Ibid.*, 1001; 1 Page on Cont., sec. 526; *Greenhood on Pub. Pol.*, 80; *Spring Co. v. Knowlton*, 103 U. S., 49; *Knowlton v. Spring Co.*, 57 N. Y., 518; *Kearley v. Thompson*, L. R., 1 Q. B. Div., 742; *White v. Bank*, 22 Pick., 181; *Wald's Pollock on Cont.* (3 Am. Ed.), 502. We have seen that he may recover where there has been any unfair advantage taken or imposition practiced. *Webb v. Fulchire*, *supra*.

But it must not be supposed from what has been said, that in order to deprive a party of the right to repudiate an illegal contract and to recover money already paid thereon, it is necessary that the illegal transaction should have been fully executed, as it is quite sufficient for that purpose that there has been a partial fulfillment of the illegal undertaking by the party against whom the action is brought for the recovery of the amount so paid to him. 15 Am. & Eng. Enc., 1007. We believe that the law writers and the courts are fairly well agreed upon that proposition. *Kearley v. Thompson*, *supra*; *Knowlton v. Spring Co.*, *supra*; *Ullman v. Fair Asso.*, 167 Mo., 273; *Wald's Pollock on Cont.* (3 Am. Ed.), 502, 507;

Hooker v. DePallos, 28 Ohio St., 251. Especially should this be the law where the party who has thus partially performed the contract in return for the money received by him from the plaintiff can not be put *in statu quo*, which is the case here. Lord Justice Fry, in Kearley v. Thompson, *supra*, for the court, said: "We hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under the illegal contract can be recovered back." Chief Justice Coleridge, Lords Esher, Bowen and the other eminent Judges who sat with them, fully concurred in this view. This has been generally accepted as the correct rule, even by the courts which hold that money paid on an illegal contract may be recovered back where the contract is wholly executory on the other side or as to the defendant. The principle should certainly apply to our case, in which it appears that the defendant has substantially performed the contract in part and can not be restored to its original position, and that the plaintiff has received a benefit which is not only substantial, but fully commensurate with the amount he has paid on the contract. While he loses the right to have the unexecuted portion of the contract performed, he does not by any means depart from the court empty handed. Having received an equivalent for his money in the increased value of his property by the placing of the city hall where it is, he has no just ground to complain. We find no error in the conclusion and judgment of the court upon the verdict. No error.

A public corporation, or a private one owing the duty to serve the public, charging reasonable and equal rates, can not contract away its power to discharge such duty. Soloman v. Sewerage Co., 141—p. 449; Griffin v. Water Co., 122—206; Leavell v. Telegraph Co., 116—211; Logan v. R. R., 116—940; Parrott v. R. R., 165—295; Kansas City Paper House v. Foley Rwy. Printing Co., 85 Kan., 678, 118 Pac., 1056, 39 L. R. A. (N. S.), 747, Ann. Cas., 1913A, 294.

Discrimination, free passes, rebates, etc.—The statute against discrimination in rates is intended to secure to the public equal and impartial participation in the use of the facilities which the company is capable of affording, and which it is its duty to provide. Lumber Co. v. R. R., 141—171; *Ib.*, 136—479; Freight Discrimination Cases, 95—428, 434, 96—1. A common carrier must serve the public without discrimination, and must sell its tickets and accommodations in the order of application. Patterson v. Steamship Co., 140—412; Basnight v. R. R., 147—169; but the charge of an additional sum if a ticket is not procured is valid, provided reasonable opportunity is given to get a ticket. Ammon v. R. R., 138—555. Discrimination by rebates is prohibited. Wilcox v. R. R., 154—582. The same rule applies to other corporations; insurance, Smathers v. Ins. Co., 151—98. Revisal, 4775; electric company, Horner v. Electric Co., 153—535; telephone company, Tel. Co. v. Tel. Co., 159—9, and Woodley v. Tel. Co., 163—284; but such company will not be compelled to place a phone in a bawdy house. Godwin v. Tel. Co., 136—258.

The Corporation Commission has power to prevent discrimination, etc. Revisal, 1094, 1095, 3749. Free passes prohibited, Revisal, 1105; and railroad company is liable to indictment, 122—1052, 125—666; but the holder

of the pass is a passenger so as to be protected from injury from negligence. *McNeill v. R. R.*, 135—682.

County authorities.—The power of the commissioners is to be used for the benefit of the public alone, and they can not contract to maintain a public road or bridge so as to be liable to an individual for the breach of such contract. *Glenn v. Comrs.*, 139—p. 417; *Greenleaf v. Comrs.*, 123—30; *Stratford v. Greensboro*, 124—127; *Trustees v. Realty Co.*, 134—41; in the latter case a contract to help in the building of a bridge was held valid.

See generally, *Clark Cont.*, 288; 1 *Page Cont.*, secs. 415, 416; 15 *Am. & Eng. Encyc.*, 963; 9 *Cyc.*, 498; 6 *R. C. L.*, 743.

3. Agreements affecting the government.

(157) LANCE v. HUNTER,

72 N. C., 178, 25 A. R., 454—1875.

This was an action to recover land. There was a judgment for the plaintiff, and defendant appealed. Affirmed.

BYNUM, J. The facts of the case are: Joseph Lance, one of the plaintiffs, in 1863 contracted to sell the land in controversy to J. H. Hunter, the father of the defendant, and gave him a bond to make title upon consideration that he would enter the military service of the Confederate States and serve out the term of the war as a substitute for his son. Hunter did enter the Confederate army as a soldier; served during the war, and in all things performed his part of the contract. Hunter has since died, leaving the defendant as his assignee of the contract, and also as one of his heirs at law, in possession of the land to recover which this action is brought.

The parties have submitted the case upon the following agreement: "It is agreed that the whole case shall turn upon the validity in law of the said contract; if it is valid, they (the plaintiffs) shall not recover; if it is not valid, they shall recover." We are relieved from any discussion of the single question thus presented by the numerous decisions of this court, all to the same effect; that is, that all contracts such as this were in aid of the rebellion, and, as such, were against public policy and are void. *Smitherman v. Sanders*, 64 N. C., 522; *Critcher v. Holloway*, *Ib.*, 526; *Clemmons v. Hampton*, *Ib.*, 264; *Leake v. Comrs.*, *Ib.*, 134; *Logan v. Plummer*, 70 N. C., 388, and *Davis v. Comrs.*, 72 N. C., 441.

The difficulty I had was whether, both parties being *in pari delicto*, this court could lend its aid in restoring the plaintiffs to that possession which they gave the defendant in part performance of the illegal contract. As, however, the contract was void *ab initio*, and as though it had never been, and the plaintiffs have the legal title, it would seem that, upon principle, they are entitled to recover. But there is little in the conduct of the plaintiff Lance

that commends it to a just or generous mind. Both the father and the very son whose life was saved, perhaps, by the performance of the contract by Hunter, after the war and danger are over, now seek to deprive him of a possession acquired at such peril and in such good faith. Most persons of sound morals would rather be the defendant without than the plaintiffs with the land. There is no error.

The following were valid: A note given for rent of land, and the land was to be used to raise food for laborers employed by the government, *McKesson v. Jones*, 66—257; a county contracted a debt for equipping soldiers, and afterwards borrowed money to pay it. *Poindexter v. Davis*, 67—112. See 6 R. C. L., 713.

4. Agreements tending to interfere with public justice.

1. COMPOUNDING A CRIME.

(158) LINDSAY v. SMITH,

78 N. C., 328, 24 A. R., 463—1878.

Civil action for breach of covenant. The defendant demurred, the court sustained the demurrer, and the plaintiff appealed.

BYNUM, J. This is an action for breach of covenant. The defendants demur to the complaint, and the facts are these: On the 17th of February, 1874, an indictment was pending in the Superior Court of Guilford County, against the plaintiff, Lindsay, for erecting and maintaining a public nuisance, by constructing a dam across a certain creek, and ponding back the water, which thereby became stagnant, fetid and unwholesome, to the common nuisance of the citizens. At that date the covenant sued on was entered into, whereby the defendants covenanted under the penalty sued for, to cut, maintain and keep in repair, a certain ditch through the lands of the plaintiff; and the plaintiff covenanted that when the work was done, he would pay the defendants \$50; and it was further covenanted as follows: "And it is further agreed by all the parties hereto, in consideration of the premises, that the indictment now pending in the Superior Court of Guilford County, against the said Lindsay, . . . shall be discontinued and not proceed, and the prosecution thereof stopped without cost to the said Lindsay. . . . And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties, until and unless the indictment hereinbefore spoken of shall be discontinued without cost to said Lindsay." And this covenant is signed by the plaintiff and defendants.

Assuming this covenant to have been broken by the defendants, do these facts constitute a cause of action?

The general doctrine was admitted by the plaintiff's counsel, that no executory contract, the consideration of which is *contra bonos mores* or against the public policy of the laws of the State, can be enforced in a court of justice. It was further admitted that when the consideration of a contract is compounding a felony, or the suppressing a prosecution of an offense strictly public in its character, such a contract can not be enforced. But it was contended that this doctrine applied only to felonies, or at most, to public misdemeanors, and that it had no application to offenses, though indictable, yet private in their nature, as affecting an individual or a community, as in this case. In our State it has been decided directly otherwise. *Vanover v. Thompson*, 49 N. C., 485. There, Thompson executed his promissory note to Vanover "to be valid and legal, provided the said Vanover shall not appear as a prosecutor or witness against James Thompson, with whom the said Vanover has a controversy; now if the said Vanover shall thus appear this note to be null and void." It does not appear what was the offense of Thompson, but a State's warrant had been issued against him by a justice of the peace, for some offense personal to Vanover, who failing to appear as a witness, the proceedings were dismissed. The plaintiff was nonsuited, and it was then pronounced as a well-settled principle that all contracts founded upon agreements to compound felonies, or to stifle prosecutions of *any kind* are void and can not be enforced. And in *Garner v. Qualls*, 49 N. C., 223, the consideration of the contract was the suppressing the prosecution for an *alleged forgery*. The obligee procured the bond to be executed by representing that a kinsman of the obligor had committed an indictable offense, and by agreeing not to prosecute. It was held that the bond was void, *whether any such offense had been committed or not*. This case is, therefore, a conclusive answer to the objection taken in our case, that the supposed indictment did not charge an indictable offense. In *Garner's* case, the obligor *believed* an offense had been committed, and the consideration of the note was to suppress inquiry about it. It is a matter of the gravest public concern, that all infractions of the criminal law should be detected and punished. A party can not take care of his private interest by depriving the State of a witness or an active prosecutor, which is the means relied on for the conviction of offenders; much less can he pollute the very fountains of criminal justice, by suppressing an indictment already instituted against him. *Thompson v. Chitman*, 49 N. C., 47; *Ingram v. Ingram*, 49 N. C., 188; *Blythe v. Lovinggood*, 24 N. C., 20.

So in civil cases, all contracts prohibiting parties from bringing an action and all agreements purporting to oust the courts of their

jurisdiction; all agreements to pay money to stifle or suppress evidence or to give evidence in favor of one side only, or not to appear as a witness in a civil suit; all contracts, bonds, indemnities and undertakings, tending to induce sheriffs, clerks, jailers, and other public officers to violate or neglect their duty or made to protect them from the consequences of their misconduct, are absolutely null and void, as contracts obstructing or interfering with the administration of public justice, and as being contrary to the public policy of the law. 1 Add. on Cont., sec. 258.

But the defendant's counsel contends with great ingenuity that there are two covenants in this sealed instrument, and that they are *divisible*, part being good, and part bad; that the contract of the defendants is to do two things; first, to dismiss the indictment, which is illegal and void; but second, to cut and keep up the ditch, which is legal and valid, and is the contract for the breach of which the action is brought. In regard to this proposition the general rule is that if there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced, although the other fails, under the maxim "*utile per inutile non vitiatur*." But where there is but one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void, as where one sum is to be paid for the doing of a legal and an illegal act. Thus, where upon a contract for the hiring and service of a housekeeper at certain agreed wages it appears to have been a part of the contract that the housekeeper should cohabit with her master, the whole will be void and the wages irrecoverable by her. *Rex v. Northingfield*, 1 B. & Ad., 912; *Willyams v. Bullmore*, 32 Beav., 574; 1 Add. on Cont., sec. 300. In *Alexander v. Owen*, 1 T. R., 227, the case was this: Upon a contract of sale of tobacco, it was agreed that counterfeit money should be taken in payment, and the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive it and brought an action to recover the price of the tobacco, but the court said that the sale could not be held to be good and the payment bad; if it was an illegal contract, it was equally bad for the whole, and the parties being *in pari delicto*, *melior est conditio defendentis*. Apply these principles to our case. There was but one indivisible consideration moving from the plaintiff, to wit, the sum of fifty dollars, and for that consideration, the defendants covenant to do two things,—the one legal and the other illegal. The consideration can not be divided and enough of it assigned to support the contract to cut and maintain the ditch, but it, as it were, *per my et tout*, enters into and supports both promises.

But there is another view equally fatal to this action. A part of

the covenant is in these words: "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto, until and unless the indictment hereinbefore spoken of, shall be discontinued without cost to the said Lindsay." So the validity of the contract is expressly made to depend upon the performance of the very act which makes it invalid, to wit, the dismissal of the indictment. The covenants were not to be binding until the prosecution had been discontinued, and the contract to dismiss it was immoral and void. In such cases the law will leave the parties where it finds them. *Kimbrough v. Lane*, 11 Bush., 556; *Setter v. Alvey*, 15 Kans., 157; 1 *Smith Lead. Cas. Marg.*, pp. 153-165, and notes; *King v. Winants*, 71 N. C., 469, and 73 N. C., 563.

No error.

To the same effect, *Cameron v. McFarland*, 4—299; *Comrs. v. March*, 89—268; *Corbett v. Clute*, 137—546. An attempt to secure the nonattendance of a witness was held contempt, *In re Young*, 139—552; but an agreement to furnish evidence was held valid, 48—363. Compounding a felony is indictable, *State v. Hodge*, 142—665; but one may compromise the private injury. *Self v. Clark*, 55—309; *Smith v. Hartsell*, 150—71; *Alston v. Hill*, 165—255; *Jones v. Dannenburg*, 112 Ga., 426, 37 S. E., 729, 52 L. R. A., 271; *Wood v. Casserleigh*, 30 Colo., 287, 71 Pac., 360, 97 A. S. R., 148.

See generally, *Clark Cont.*, 292; 15 *Am. & Eng. Encyc.*, 977; 1 *Page Cont.*, 417-422; 9 *Cyc.*, 505; 6 *R. C. L.*, 755.

2. ARBITRATION AGREEMENTS.

(159) BRADDY v. INSURANCE CO.,

115 N. C., 354, 20 S. E., 477—1894.

Civil action, in which there was a verdict and judgment for the defendant, and the plaintiff appealed.

AVERY, J. While it is well settled that an agreement in a policy of insurance to submit to arbitrators the single question of the amount of loss by fire sustained by the person injured is not invalid (*Manufacturing Co. v. Ins. Co.*, 106 N. C., 28; *Carroll v. Ins. Co.*, 72 Cal., 297), it is equally well understood that a contract which would oust the jurisdiction of the courts by leaving all of the matters involved in any controversy that might arise between insurer and insured to such arbitrament is void as against public policy. *Angel on Insurance*, 431; *Scott v. Avery*, Ex. S. C., 20, En. L. & E. Rep., 327; *Sancilito v. C. U. A. Co.*, 66 Cal., 256; 2 *Biddell on Ins.*, sec. 1154. If a stipulation in the policy to submit all controverted questions that may arise in case of loss to arbitrators can not be enforced, will the courts allow a contract making the submission of the single question of the amount of loss

sustained, to deprive a plaintiff of the opportunity to try the issues of fact involved, of his right to recover before a jury by reason of the misconduct of the parties or of the arbitrators? If either party acts in bad faith in order to defeat the real object of the arbitration, the other is absolved from duty in regard to it, and from any obligation to enter into a new agreement for arbitration. 2 May on Ins., sec. 496b; *Uhrig v. Ins. Co.*, 101 N. Y., 362; Wood on Ins., sec. 230. "A claimant under such a policy," said the court in *Uhrig's case*, *supra*, "can not be tied up forever without his fault and against his will." Citing that case to sustain the proposition, Biddell, in his work on Insurance, sec. 1162, says: "Where each party duly selects an arbitrator, but the umpire fails of selection, it is said there need not be a new arbitration." The Supreme Court of Pennsylvania, in *Com., etc., Ins. Co. v. Hoiking*, 115 Pa. St., 416, held that where two arbitrators, appointed under an agreement like that in the policy sued on, failed to agree, then a suit brought by the plaintiff should be deemed a revocation of such agreement. The parties can contract that, at the written request of either of them, they will each select an arbitrator and empower them to choose an umpire; but if the courts should give their sanction to any course of conduct on the part of the insurer or of the arbitrator selected by the defendant, that might be repeated in any case which might arise and operate to indefinitely delay the precedent arbitration and prevent the bringing of an action, it would manifestly enable the insurer by appointing an interested and corrupt appraiser to accomplish indirectly what the law declares shall not be done directly by virtue of a stipulation or agreement.

By the terms of the contract to submit to the appraisers, they were, when appointed, to meet in the town of Winston on the 1st day of December, 1892, and the parties were to waive all further notice of the meeting on that day, or their subsequent meetings. The plaintiffs named one L. G. Cherry, of Winston, and the defendant selected one Westbrook, of Atlanta, Georgia. When the two met, we must assume that the defendant, having waived all claim to further notice, was cognizant of all that was done by the arbitrators selected. The first proposition, emanating from Westbrook, was to select one Wilson, a resident of Winston. Cherry objected, and assigned as a reason that Wilson had already been suggested by another insurance company, liable for the same loss, as a suitable appraiser to act for it in estimating the very same loss. This objection was not an unreasonable one, since, supposing that Cherry's objection was to secure the services of not only honest, but unprejudiced men, he did what any cautious lawyer would have advised his client to do in reference to a juror when

he objected to having the rights of the plaintiff passed upon by a man who might be biased by the fact of his selection by another company which was antagonistic to the plaintiff, to represent it in passing upon the very same question. The next move was also made by Westbrook, when he proposed that each appraiser should nominate three men for umpire, and the two should try to agree upon one of the six so selected. Cherry named three business men of the town of Winston, to all of whom Westbrook objected, but it does not appear that he assigned any cause. Westbrook named three persons, all residents of the State of Georgia. Cherry objected, and stated as a reason for so doing that they all lived in the State of Georgia, and, as we assume, were unknown to him. The trial of the question of the amount of loss was to be left for decision to appraisers instead of a jury, to whom but for the agreement the plaintiff might have demanded that it be submitted. We do not think it unreasonable for an appraiser, acting with a view to secure the services of an unprejudiced, competent and honest associate, to insist that only the names of persons living in the vicinity, or in the State, or in some way known to him, at least by reputation, should be tendered to him to take the place and discharge the functions of a juror. The failure of the arbitration was evidently due to the unreasonable conduct of the appraiser selected by the defendant, and they had notice of all that was done by him. It is not necessary for us to follow the ruling of the court of Pennsylvania in holding that, in any failure of arbitrators selected, to agree, the plaintiff is left at liberty to sue though good reasons could be given for so doing. But in this particular case, where the defendant permitted the appraiser, chosen by it, to leave for Georgia, giving his address to Cherry, after acting so unreasonably, and held its peace then and thereafter till the 10th of February, 1893, when the summons was issued, it is manifest that if the company did not intend or consent, by dilatory measures, to defeat the bringing of an action altogether, the success of the stratagem adopted by Westbrook, if approved, might point out the way for an unscrupulous agent in the future designedly to accomplish what the law would declare unlawful if it were attempted by means of the enforcement of a contract.

The court instructed the jury that if they believed the evidence, to find by an affirmative response to the first issue that the arbitration was still in force. In this ruling we think that there was error. As another trial will be had, and other additional evidence may be brought out bearing on the other questions involved, we deem it unnecessary to advert to any other exceptions.

New trial.

This case is approved in 116—491 and 123—164. Such provisions may

be conditions precedent. 106—28, and 110—176. An agreement restricting the right of appeal is void. *Falkner v. Hunt*, 68—475; *Runnion v. Ramsay*, 93—410; *Pendleton v. Electric Light Co.*, 121—20. Agreement to arbitrate may be a separate contract for breach of which party would be liable. *Carpenter v. Tucker*, 98—p. 319; *Kelly v. Tremont Lodge*, 154—97; *Williams v. Manfg. Co.*, 154—205; *Kinney v. Employ. Association*, 35 W. Va., 385, 14 S. E., 8, 15 L. R. A., 142.

See also 2 Am. & Eng. Encyc., 570 *et seq.*; *Hamilton v. Ins. Co.*, 136 U. S., 242; *Clark Cont.*, 294; 1 *Page Cont.*, secs. 347-353; 9 *Cyc.*, 510; *Pollock Cont.*, 445; 6 R. C. L., 752.

5. Agreements tending to encourage litigation.

(160) MUNDAY v. WHISSENHUNT,

90 N. C., 458—1884.

Civil action to recover for services rendered under a written contract, the substance of which is stated in the opinion. There was a verdict and judgment for the defendant, and plaintiff appealed.

MERRIMON, J. As no special grounds of error are assigned in the record, it becomes necessary to determine whether or not, in any view of the whole record, the plaintiff was entitled to recover. His counsel insisted in the argument before us, that the allegations in the complaint constituted a good cause of action, and the defendants having denied the same, the evidence introduced on the trial fully proved them, and, therefore, the court erred in holding that the plaintiff could in no wise recover.

It is a clear principle of law, that an engagement, whether under seal or by parol, to do an immoral act or service, or such acts as contravene the settled policy of the law, can not be upheld as a binding contract, nor can the plaintiff in an action recover compensation for services rendered under or in pursuance of such engagement. The sound maxim of the common law is, *ex turpi contractu non oritur actio*. Whatever contravenes sound morality, or the policy of the law, vitiates and renders void any contract or engagement into which it may enter.

In our judgment the contract sued upon in this case is illegal and void, because it stipulates for a service to be performed by the plaintiff that the law forbids, upon grounds of public policy, and denominates maintenance and champerty.

One Jones had brought his action in the Superior Court of Alexander County against the testator of the defendants, to recover a tract of land. The plaintiff in this action was in no way a party to or interested in that suit. He was a stranger to it, and not related to the defendant therein. He was not a lawyer, but a layman, and not authorized to manage or defend suits for other people in courts of justice. Nevertheless, he entered into a contract,

the substance of which was that the plaintiff in this case should aid the defendant in the action mentioned, in defending and managing his case, and receive as compensation for his services in that respect one-half of the land in controversy, or one-half its value, if the defendant should secure it, or if the suit should be compromised, then one-half of whatever might be realized or saved by such compromise; and if the defendant should entirely fail of success, the plaintiff was in that case to get nothing for his services. This comes clearly within the meaning of maintenance and champerty.

It was not the business of the plaintiff to advise about and manage lawsuits, and he had no authority to do so. He interfered in a litigation that in no way concerned him, and engaged to help one of the parties to it (the defendant), exactly how, does not appear, but in some effective way, and to receive as pay for his services one-half of whatever advantage might be realized by his employer. This is precisely what the law forbids. It does not tolerate or permit such interference. If the plaintiff might so interfere in the case referred to, he may do so in any case, and to any extent. If he may do so, every other person may do likewise; and it is easy to see that the result would be that all manner of combinations and conspiracies would be brought about to prevent and stifle justice, sometimes in one way and sometimes in another. It is a wise, wholesome and necessary provision of the law, justified by the experience of ages, that men shall not interfere in lawsuits in which they have no interest, to help one party or the other in consideration of a part of the fruits of litigation. Such contracts are not only invalid, but it is indictable at the common law to so interfere. This court has uniformly recognized and upheld the doctrine of the common law on this subject. In *Barnes v. Strong*, 54 N. C., 100, it was held that a contract between a father and his son, made during the pendency of a suit against the father, whereby the son agreed to defend the suit for the father, in consideration of receiving a part of the property in controversy, in case of success, is void, as coming within the prohibition of the common law against champerty. This case is a stronger one than that.

It was insisted on the argument that the purpose of the plaintiff was to bring about a compromise of a lawsuit, and not to foment strife. If that be granted, it was still an interference and taking sides for a part of the advantage to be gained. But the contract shows very clearly it was contemplated that defense was to be made, and an effort to secure the whole land in controversy, in which case the plaintiff was to have one-half of it, or half its value in money. This was champerty, and rendered the contract

void. *Martin v. Amos*, 35 N. C., 201; *Barnes v. Strong*, *supra*; 7 Wait's A. & D., 73; 2 Bacon Abr. Title, Champerty.

There is no error, and the judgment must be Affirmed.

"Maintenance" is properly defined as an "officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." "Champerty" is a species of maintenance whereby a stranger makes a "bargain with plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." The harsher application of the doctrine contained in these definitions, as it formerly obtained, has been very much relaxed and modified. Under the more recent decisions many exceptions have been recognized, and it has been very generally accepted that an agreement will not be held within the condemnation of this principle unless the interference is clearly officious and for the purpose of stirring up "strife and continuing litigation." *Smith v. Hartsell*, 150—p. 76, citing *Gilman v. Jones*, 87 Ala., 691; *Torrence v. Shedd*, 112 Ill., 466; *Thalhimer v. Brinkerhoff*, 3 Cowen, 623, 15 A. D., 308. See also *Nichols v. Bunting*, 10-86; *Slade v. Rhodes*, 22-24. A bond conditioned "to break the will or pay all costs" is void for maintenance. *Martin v. Amos*, 35-201. A man may maintain the suit of his near kinsman, servant or poor neighbor, out of charity or compassion, but not for a part of the results of litigation. *Barnes v. Strong*, 54-100; but in *Wright v. Cain*, 93-296, the parties were not *in pari delicto*, on account of the difference in position. An agreement giving the right to bring a suit for breach of covenant of warranty, without consideration, is champertous. *Ravenal v. Ingram*, 131-549. The doctrines of champerty were adopted at common law to prevent the transfer of rights of action. 5 Am. & Eng. Encyc., 818.

Attorneys' contingent fee.—In some States such a contract is considered champertous and in others valid. 1 L. R. A., 516; 4 L. R. A., 113; 9 L. R. A., 90. In North Carolina it seems to be valid. *Allison v. R. R.*, 129-336. An agreement that the client will not settle the suit without the consent of the attorney has been held invalid. *Burho v. Carmichael*, 117 Minn., 211, 135 N. W., 386; *In re Snyder*, 190 N. Y., 66, 82 N. E., 742, 123 A. S. R., 533, 14 L. R. A. (N. S.), 1101, 13 Ann. Cas., 441.

Attorneys' fee in a note.—A stipulation that "in case this note is collected by usual process, the usual collection fee shall be added and payable therewith," is void, as against public policy. *Tinsley v. Hoskins*, 111-340; *Brisco v. Norris*, 112-671; so also in a mortgage, *Williams v. Rich*, 117-235; *Turner v. Boger*, 126-300; *Bank v. Lumber Co.*, 128-193; *Staton v. Webb*, 137-35; *Revisal*, 2346. In some States such a stipulation is valid. See generally, 4 Am. & Eng. Encyc., 98 *et seq.*

Champerty and maintenance generally, 1 Page Cont., secs. 338-346; 9 Cyc., 500, 515; *Clark Cont.*, 296.

6. Agreements of immoral tendency.

(161) BROWN v. KINSEY,

81 N. C., 245-1879.

DILLARD, J. The case in the court below was four appeals from a justice's court, founded on four bonds executed by the testator of the defendant on the 13th day of September, 1872, to Winefred Hill, and assigned by her after due to the plaintiff. By order of the court, the actions were consolidated, and the trial was had by a jury on the issue joined on the plea of immoral con-

sideration, and the evidence relied on by the defendant being all in, His Honor being of opinion that the same was not such as reasonably to warrant a finding of a matter of avoidance pleaded, so held. Thereupon the verdict was for the plaintiff, and the defendant appealed.

The question on appeal is whether the evidence advanced was or was not such as in law to authorize and require the judge to submit it to the jury upon which to find the fact of immoral consideration alleged by the defendant.

The evidence was, that the testator of defendant died in October, 1872, and that about five years before his death Winefred Hill, the assignor of the plaintiff, gave birth to a bastard child begotten by him (said testator), and afterwards, in the course of the same illicit intercourse, he executed to her a bond under seal for three hundred dollars. Winefred, on her death, said he owed her nothing, and that when the bond was delivered to her, testator made no declaration as to his reason or to the consideration moving him thereto. Upon the death of testator's wife, the said Winefred went to live in the house of testator, and took charge of his domestic business about a month before the testator died. And whilst there, on the 13th of September, 1872, during the continuance of the immoral connection, the testator took up the bond for \$300 and destroyed it, and then and there executed to said Winefred the four bonds now in suit, one of them falling due on each first day of January in the next four succeeding years, stating at the time that they were executed in place of the bond for \$300, and he made no declaration as to the motive for the substitution or the consideration on which they were founded.

Upon the issue joined, the bonds under which the plaintiff claims being under seal, the execution and delivery made them effectual at law, and made them *deeds, things done*; and by the common law they had the force and effect to authorize plaintiff to recover without any consideration, with power, however, in the defendant to have the same held null upon proof of illegal or immoral consideration, not from any motive of advantage to him or his testator, but from consideration of public interest and of morality. *Harrell v. Watson*, 63 N. C., 454; 2 *Chitty on Cont.*, 971; *Collins v. Blantern*, 1 *Smith's Lead. Cas.*, 153.

On the trial, then, we are to take it that plaintiff was absolutely entitled to recover, unless the defendant showed the immoral consideration alleged, by evidence full and complete, or by proof of such facts and circumstances as would reasonably warrant a jury to find it as a fact. In other words, the *onus* was on the defendant, and in order to defeat the recovery it was incumbent on him to show that the bonds were not voluntary, that is, not executed

as a mere gift, and not on the consideration of past cohabitation, which is legal, but on the consideration, in whole or in part, for future criminal intercourse, or to show that the nature of the securities was such as to hold out an inducement or constitute a temptation to Winefred Hill to continue the connection.

It is indisputable that the bonds, if executed as a gift by the testator of defendant to Winefred Hill, the mother of his bastard child, would be legal and enforceable, it not being immoral to assist her by gift to raise his progeny; and it is equally settled that if they were given for past cohabitation, they would be binding on the ground that the illicit connection was an evil already past and done, and the public had no interest to defeat them. The only restriction put on the contracts of the parties is, that they shall not stipulate for future fornication, or in such manner as that the security given shall operate as an inducement or motive to go on in the vicious course. 2 Chitty on Cont., 979; *Trovenger v. McBurney*, 5 Cowen, 253; *Gray v. Mathias*, 5 Vesey's Ch. Rep., 286.

In these cases it is held that the continuation of the criminal intercourse after the execution of the bond or contract impeached for immorality, does not invalidate the same; but that it is to be avoided and held null only on proof that it was executed in whole or part on the understanding that the connection was to continue. This will be apparent from the following extracts taken therefrom. In the case of *Trovenger v. McBurney*, *supra*, the court say: "A bond executed for the cause of past cohabitation, although the connection is continued, is not invalidated thereby." The test always is, does it appear by the contract itself, or was there any understanding of the parties, though not expressed, that the connection was to continue. In the case of *Gray v. Mathias*, *supra*, a bond was given during the cohabitation, and in the course of the cohabitation a second bond was given, which, upon its face, recited the existing illegal connection and stipulated for its continuance, with an annuity for the woman in case of discontinuance; and it was held that the last bond was void, but the former was good, although the cohabitation continued after its execution.

In the case of *Hall v. Palmer*, 3 Hare, 532, the bond was executed to the woman conditioned to pay an annuity from and after the death of the obligor, and the parties lived together at the time and continued so to live afterwards upon a declaration of the obligor that he did not intend to break off the connection; and upon a reference to the master, it being found as a fact that it was given for past cohabitation, it was held that the continuance of the connection after the execution of the obligation had no effect to invalidate it.

From the principle decided in these cases, it may be taken as

settled that the cohabitation of the testator of defendant with Winefred Hill after the execution of the bond to her, did not by any legal presumption invalidate the same; and that the same could only be held void on proof that there was an understanding, express or implied, that the criminal intercourse was to be continued. Applying these principles to our case, we have this state of things: At the time the first bond for \$300 was given, Winefred testified that testator of defendant owed her nothing, and therefore the bond was voluntary; or if not that, then it may have been on consideration of past cohabitation, and if so, it was valid, or it may have been partly for past and partly for future, or altogether for future intercourse, and if the latter, then the *onus* was on the defendant to prove it otherwise than by mere evidence of a continued connection after the bonds were executed.

The defendant, on the trial of the issue, had no proof, except of the execution of the bonds in the course of an illegal intimacy between the parties and a continuation thereof afterwards up to the death of the testator, together with an admission by Winefred that they were not executed for any debt due to her; and obviously in such state of the proof the jury could not have done more than have a suspicion or conjecture, whether the bonds were executed as a gift, or for past cohabitation, or wholly or in part for future cohabitation.

The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue, or furnish more than materials for a mere conjecture, the court will not leave the issue to be passed on by the jury, but rule that there is no evidence to be submitted to their consideration, and direct a verdict against that party on whom the burden of proof is. *State v. Waller*, 80 N. C., 501, *State v. Patterson*, 78 N. C., 470; *Sutton v. Madre*, 47 N. C., 320; *Cobb v. Fogalman*, 23 N. C., 440.

In our opinion, therefore, the judge properly held that there was no evidence of the illegal or immoral consideration alleged, and in so doing he committed no error. Affirmed.

See also *Burton v. Belvin*, 142—151; *Clark Cont.*, 300; 15 *Am. & Eng. Encyc.*, 959-963, and notes; 1 *Page Cont.*, sec. 400; 9 *Cyc.*, 516; *Chateau v. Singla*, 114 Cal., 91, 45 *Pac.*, 1015, 55 *A. S. R.*, 63, 33 *L. R. A.*, 750; *Pollock Cont.*, 410; 6 *R. C. L.*, 716.

7. Agreements tending to fraud or breach of trust.

(162) CATON v. STEWART,

76 N. C., 357—1877.

Civil action on contract. Plaintiff was the owner of a distillery and the defendant was the government storekeeper at the same. Upon the plaintiff's saying that he could not run the distillery longer because he was not making any profit, the defendant promised to pay him \$25 a month for a specified time, if he would continue to run so that he could retain his position and pay as an officer. There was no intention to defraud the government, nor was the government defrauded. The defendant failed to pay part of what was agreed. There was judgment for the plaintiff, and defendant appealed.

PEARSON, C. J. Prisoner feeds the watch dog and the dog fondles upon the prisoner. There is no use in keeping the dog on watch longer. So in our case, as soon as the distiller became a prisoner of the storekeeper and the storekeeper agreed "to divide profits," there was no use in having such a storekeeper, and the policy of the government in providing "storekeepers" at high wages was thereby completely frustrated.

By this agreement the storekeeper was "led into temptation," for he could not deal hard, that is, "watch closely" his prisoner and dependent, because their mutual interest required the distillery should be kept in operation.

The distiller was led into temptation to defraud the government, for he had an assurance that his operations would not be watched very closely. Had this arrangement been made known to the revenue officer it would have been his duty instantly to discharge the storekeeper.

The transaction as nearly approaches "bribery and corruption" as can well be imagined.

If the storekeeper had agreed to receive of the distiller \$25 a month out of his profits it would have been a case of bribery. Here the storekeeper agrees to pay the distiller \$25 a month out of his wages in order to induce him to continue his operations, and the corruption consists in the fact that the distiller was thereby assured that he would not be closely watched, thus defeating the policy of the Act of Congress in the regulations for the appointment of storekeepers at high wages and detailed instructions to watch the operations of distillers.

Whenever parties enter into an arrangement whereby the policy of the law is defeated, they are *in pari delicto*, and the law will

not aid either party. See the cases cited in the brief of Mr. McCorkle, counsel for defendant.

There is error. Judgment below reversed and upon the facts agreed judgment that defendant go without day and recover his costs.

(163) SNIPES v. WINSTON,

126 N. C., 374, 35 S. E., 610, 78 A. S. R., 666—1900.

FAIRCLOTH, C. J. The Board of Aldermen of the city of Winston on March 1, 1898, elected the plaintiff a "street boss," and contracted to pay him \$50 per month for six months. His duties were to superintend, construct and repair the streets, and to keep in order the sewerage system of the city. At the time of said election and contract, the plaintiff was a member of the Board of Aldermen, and participated in the meeting at which he was elected.

A new Board was elected and inducted into office on May 1, 1898, when the plaintiff was discharged and paid for the services then rendered. He now sues for the balance specified in the contract for the next succeeding four months. His Honor held, upon these facts, that the plaintiff could not recover, and rendered judgment for the defendant.

The Board of Aldermen, of which the plaintiff was a member, was the agent of the city, and its duty was absolute loyalty to the best interests of its principal. The plaintiff was interested in obtaining the best possible contract from himself and his associates on the Board. There was then antagonism between his duty to the city and his personal individual interest in making said contract.

It is against public policy to permit such contracts to be enforced. It would be unsafe for the plaintiff, acting as employer, to become himself by the same bargain, an employee. *Smith v. Albany*, 61 N. Y., 444, is a case in point. The plaintiff, being a member of the common council, contracted with the Board to furnish horses and carriages for the procession celebrating 4 July, which the council had in charge. It was held that he could not recover. Story on Agency well states the principle: "It may be correctly said with reference to Christian morals that no man can faithfully serve two masters whose interests are in conflict. If then the seller were permitted as the agent of another to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps in many cases too strong for resistance by men of feeble morals or hackneyed in the common devices of worldly business, would be held out which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive pro-

hibition has been found to be the soundest policy, encouraged by the purest principles of Christianity. 'This doctrine is well settled at law. And it is by no means necessary in cases of this sort that the agent should make any advantage by the bargain. Whether he has or not, the bargain is without any obligation to bind the principal.'

This principle can not be questioned, and experience has shown its wisdom. Common reasoning declares this principle to be sound, and the public is entitled to have it strictly enforced against every public official. In obedience to this reasoning and upon these authorities we hold that the contract under consideration is void and unenforceable.

All agreements, the necessary effect of which is to place a person under influences and offer him a temptation which may injuriously affect the rights of third persons, are opposed to public policy. Clark Cont., 301. This includes all the relations of trust and confidence referred to under Fraud and Undue Influence, *supra*. An agreement between certain stockholders of a corporation to "pool" their stock for the purpose of voting. Harvey v. Improvement Co., 118—693; an agreement between two administrators that one shall manage the business and be responsible. Wilson v. Lineberger, 94—641; inducing servants to break contracts. Revisal, 3365, 3374; Morgan v. Smith, 77—37; Haskins v. Royster, 70—601; county, city or town officers can not speculate in claims in county or city claims. Revisal, 3575; State v. Garland, 134—749; officers of corporation can not speculate in claims against the company. McDonald v. Haughton, 70—393; contract of officer of county, city or town, under such authority, for his own benefit. Revisal, 3572; public school officers furnishing supplies. Revisal, 3833, 3835; employing tenants in violation of their contracts. Revisal, 3366, 3367. See 15 Am. & Eng. Encyc., 945-949, and notes; 1 Page Cont., secs. 406-408; Clark Cont., 301; 9 Cyc., 493; 6 R. C. L., 719, 739. Bridgers v. Staton, 150—216; Sheppard v. Power Co., 150—776; Davidson v. Guilford, 152—436; Bd. of Comrs. Tippecanoe v. Mitchell, 131 Ind., 370, 30 N. E., 409, 15 L. R. A., 521; Spearman v. Texarkana, 58 Ark., 348, 24 S. W., 883, 22 L. R. A., 855.

8. Agreements in derogation of marriage relation.

(164) OVERMAN v. CLEMMONS,

19 N. C., 185—1836.

Action of debt upon a single bond, for the payment of the sum of \$5,000. The defendant, among other pleas, pleaded "*non est factum*;" that the bond was obtained by fraud; and specially, "that the bond was given by James Clemmons, the defendant's testator, to the plaintiff, in consideration of the plaintiff's using his influence with Mrs. Esther Hargrave, to procure a marriage between the said James Clemmons and the said Esther Hargrave." The defendant offered evidence to show that the bond was a marriage-brochage contract, and plaintiff objected, on the ground that the defense was not available in law, but could only be made in equity.

There was a verdict and judgment for the defendant, and plaintiff appealed.

GASTON, J. (after discussing the practice in regard to the general issue and special plea). The main question in dispute is, whether the consideration on which this instrument was executed, not appearing on the face of it, but alleged by plea as matter *dehors* the instrument, and found to be true, does in law avoid the instrument. Contracts promising rewards to a person, in order to obtain the exertion of any influence which he may possess over one of the parties to a contemplated marriage, to bring about the marriage, and bonds entered into to secure the performance of such contracts, have, for more than a century back, been declared void in the courts of equity; and under the name of marriage-brochage agreements, and marriage-brochage bonds, constitute a well-known subject of the jurisdiction of such courts. It was not, however, until the case of *Potter v. Hale*, or *Potter v. Read* (as it is indifferently called), and then after much litigation and difference of opinion, that this doctrine was authoritatively established. In that case, such a bond was ordered to be delivered and canceled, by the Master of the Rolls; his decree was reversed on appeal, by Lord Chancellor Somers; but on appeal to the House of Lords, the decree of reversal was itself reversed, and the original decree affirmed. It is not strange, as the jurisdiction over such bonds was first effectually asserted in a court of equity, that most of the cases subsequently occurring on the same subject, and to be found in the books, were brought in a court of equity. But after the principle of these adjudications was perfectly settled, it could not but be that the same principle would be asserted in a court of law, wherever the forms of legal proceedings gave occasion for applying it. These engagements had been denounced, not because of the imposition or oppression practiced upon one of the parties to them, but because of their repugnancy to public policy. They were condemned as mischievous to the community, inasmuch as they encouraged hireling matchmakers, invaded the peace of families, controlled the freedom of choice, and produced unequal and unhappy marriages. So unequivocally had their condemnation rested upon the ground of public mischief, that it was held that they did not admit of subsequent confirmation by the party aggrieved; he could not give them validity, for the common weal forbids them. *Shirley v. Martin*, 3 P. Wms., 74, n. 1. It can not be doubted, therefore, since the conclusive establishment of this principle, that if an action is brought at law, to recover damages for the breach of a covenant or promise to exert this forbidden influence—or an action to recover money upon an *assumpsit*, founded on such illegal consideration—or an action on a bond,

with condition expressing this illegal purpose—in all these cases, the court of law must pronounce the undertaking, the consideration, and the condition, against law, and turn the plaintiff out of court. The first object of all law is the public good; and no court will enforce private engagements, which it judicially sees are repugnant to the public good. *Ex turpi causa non oritur actio*. These positions seem to be clearly laid down by the elementary writers, and are sanctioned by the decisions to which they refer. 1 Chitty Pleading, 511, *et seq.*; Com. on Cont., Pt. 1, chap. 3, p. 62; 2 Thomas Coke, 24; Mitchell v. Reynolds, 1 P. Wms., 181; Lowe v. Peers, 4 Bur., 2225. They are recognized by Lord Hardwicke in Smith v. Aykewell, 3 Atkins, 566, who upon a motion for injunction to restrain the defendant from bringing an action on a promissory note, given by the plaintiff for £2000, which was charged by the bill, and that charge supported by affidavit, to have been given on an undertaking to procure him a marriage with a lady—or to restrain the defendant from endorsing or assigning the note, made the order to restrain the defendant from so doing, but would not make the order to prevent him from proceeding at law—evidently because by endorsing the note, the plaintiff might be shut out from his defense; but in an action by the payee, the defense would be as effectual at law as in equity.

But it might well have been questioned, whether on a bond simply for the payment of money, it was competent for a defendant to allege by plea, that the consideration of such bond was illegal, because of repugnance to public policy, and thereby avoid the bond. This was at one time a much vexed question, and accounts for the observation made by Lord Talbot, in Law v. Law, 3 P. Wms., 394, that marriage-brochage bonds were good at law. It must not, however, be regarded as one completely settled. The leading case on the subject, the authority of which has never been questioned either in England or in this country, is that of Collins v. Blantern, 2 Wilson, 347. This case distinctly holds, that a contract to tempt a man to transgress the law—to do that which is injurious to the community, is void by the common law; and that when a bond is for the payment of a sum of money, the obligor may show by plea, that the payment was to be made on a vicious consideration—vicious either on common law principles, or because of statutory enactments; and that this shown, the writing-obligatory is to be adjudged void. The authority of Collins v. Blantern was acknowledged in the strongest terms, by the former Supreme Court of this State, in Cameron v. McFarland, 4 N. C., 299, who, in conformity to it, held that the common law does not sanction any obligation, founded upon a consideration which contravenes its general policy. This impresses upon the transaction

an inherent defect, which can not be removed by the most deliberate consent of the parties, or the utmost solemnity of external form. The principle has been invariably since acknowledged in the English cases, down to the present day. [The decision here quotes from several English cases.] On full consideration, then, of this question, we feel ourselves warranted and bound to decide, that the matter specially pleaded by the defendant could be rightfully pleaded to this action, and being found to be true, the plaintiff's action was barred, and the defendant entitled to judgment.

As to marriage-brochage contracts, see generally, Clark Cont., 302; 15 Am. & Eng. Encyc., 954; 1 Page Cont., secs. 424, 425; 9 Cyc., 518; 2 Parsons Cont., 74; 6 R. C. L., 769; Duvall v. Wellman, 124 N. Y., 156; *Hermoun v. Charlesworth* (1905), 2 K. B., 123, 3 Br. R. C., 629.

An agreement between the husband and one who had enticed his wife away, that the latter should keep her and support her, is void. *Barbee v. Armstead*, 32—530. Conditions in restraint of marriage are invalid, unless they are reasonable, and do not unduly interfere with the freedom of choice; and they must be definite and certain. *Watts v. Griffin*, 137—p. 577 (that one should not marry "a common woman"). *In re Miller*, 159—126; *Lowe v. Doremus*, 84 N. J. L., 658, 87 Atl., 458, 49 L. R. A. (N. S.), 633; *Crowder-Jones v. Sullivan*, 9 Ont. L. R., 27, 4 Br. R. C., 64; *Lowe v. Peers*, 4 Burr., 2225, 6 E. R. C., 347. A promise to marry made by one already married is void if known to the other party. *Wilson v. Carnley*, 1 Br. R. C., 901.

(165) *PIERCE v. COBB*, .

161 N. C., 300, 77 S. E., 350, 44 L. R. A. (N. S.), 379—1913.

This action was brought on two notes, one for \$500, and the other for \$1,000. On the back of the notes, at the time they were executed, was the following: "It is fully understood and agreed that this note shall not become due nor collectible in any event until Mrs. Ruth Cobb shall have obtained from her husband, the said B. P. Cobb, in a court of competent jurisdiction, a complete and absolute divorce from the bonds of matrimony, and shall present the said B. P. Cobb a duly certified copy of the decree granting same; this being the consideration for which this note is given. If the said Ruth Cobb shall fail to secure said divorce within at least six months from 10 June, 1911, then this note shall be null and void. And the payees herein, in accepting this note, agree to the conditions above set out." There was a judgment of nonsuit and plaintiff appealed.

WALKER, J. . . . The nonsuit was properly entered. No contract which is against good morals or the public policy of the State will be enforced by its courts. If the consideration upon which it is based is illegal, the courts will leave the parties where it found them, and will lend their aid to neither of the parties. The law will give no sanction to a transaction which involves the violation

of its principles, nor will it afford a remedy to compel either of the parties to perform its obligation. (The court here quotes from *Edwards v. Goldsboro*, 141 N. C., at p. 72, reported *ante*, 156, and cases cited therein.) If the object of a contract is to divorce man and wife, the agreement is against public policy and void. The reason of this rule is that the law views with repugnance all contracts, the purpose or direct tendency of which, as gathered from its terms, is to dissolve the marriage tie, because of its regard for virtue, the good order of society, the welfare of the children as the fruit of the union, and the peculiar sanctity of the marital relation. The husband and wife can not do by their consent what the law forbids to be done except by the legislative will, and then only in the way and by the method authorized. "The inducement of a wife to sue for a divorce by a promise on the part of the husband to remunerate her for it, or for a husband and wife to agree that one of them shall bring a suit for a divorce and the other shall not defend, is against the law, which recognizes and upholds the sanctity of marriage, and is void. The same is true of an agreement after a divorce has been granted, that the husband will pay the wife money if she will not move for a new trial, or, where the divorce has been wrongfully granted, that the parties will not disturb it. And an agreement not to sue or make claim for alimony has been held void. A promise to marry made by a man already married, to take effect when he has obtained a divorce from his present wife, is illegal and void." 9 Cyc., 519-520. All this will be found fully discussed in the books, and especially in the one just cited. It is such familiar learning that we need not make further comment upon it. *Archbell v. Archbell*, 158 N. C., 408. The remaining question is, whether this contract is within the principle and the denunciation of the law. We think it will so appear by an examination of the indorsement on the notes. . . . Affirmed.

(166) *ARCHBELL v. ARCHBELL*,

158 N. C., 408, 74 S. E., 327, Ann. Cas., 1913 D, 261—1912.

This was an action by the wife for divorce and alimony, and the defendant set up a deed of separation, fixing the wife's property rights in bar of any claim for alimony. The court held that this deed was void, rendered a decree for alimony, and defendant appealed.

HOKE, J. In *Collins v. Collins*, 62 N. C., 153, the court made definite decision "that articles of separation between husband and wife, whether entered into before or after separation, were against law and public policy and therefore void." Since that decision

was rendered in 1867, our statutes upon "Marriage and Marriage Settlements and Contracts of Married Women," as entitled in The Code of 1883 and contained with amendments in Revisal 1905, ch. 51, have made such distinct recognition of deeds of this character, more especially in Revisal, secs. 2116, 2108, 2107, etc., that we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law. This change in our public policy, which has been not inaptly termed and held synonymous with the "manifested will of the State" (25 Arkansas, p. 634), has been already recognized in several of our decisions, as in *Ellett v. Ellett*, 157 N. C., 161; *Smith v. King*, 107 N. C., 273; *Sparks v. Sparks*, 94 N. C., 527. And while there are some differences in the matter of form and in the conditions requisite to their validity and their effect when executed, the general proposition as to the validity of these deeds, in so far certainly as they concern property rights, is in accord with that long established in England (*Hill v. Hill*, 1 H. L. Cases, 1847 and 48, 553, and notes to *Stapleton v. Stapleton*, *White and Tudor's Leading Cases in Equity*, Part II, vol. 2, pp. 1675, 1697, 1698), and which has generally prevailed with the courts in this country (*Walker v. Walker*, 76 U. S., 743; *Commonwealth v. Thomas Richards*, 131 Pa. St., 209; *Cary v. Mackey*, 82 Me., 516; *Aspinwall v. Aspinwall*, 49 N. J. Equity), all of them, so far as examined, except in New Hampshire, *Hill v. Hill*, 74 New Hampshire, 288; *Foote v. Nickerson*, 70 New Hampshire, 496. . . .

From a consideration of the authorities, we take it as established that articles or deeds of separation are permissible where the separation has already taken place or immediately follows; but that agreements looking to a future separation of husband and wife will not be sustained, and from the apparent weight of opinion it seems in making such agreements, under the circumstances indicated, the parties must be moved to it by adequate reasons, and not from mere "mutual volition or caprice," under circumstances of such character as to "render it reasonably necessary to the health or happiness of the one or the other," a position well stated in a case from Montana as follows: "An agreement between husband and wife providing for a separation, an adjustment of their respective interests in property and for the future support and maintenance of the wife, is valid only when it is to take effect at once and is immediately complied with, and when the marital relations are of such a character as to render a separation necessary for the health or happiness of one or the other. Mere willingness to live apart is not enough, neither will the agreement be enforced when it is the result of mutual caprice or reckless disregard of

marital obligations; neither will such an agreement be enforced when it is to be used as a means to facilitate a divorce." "Held, accordingly, a demurrer to the complaint was properly sustained, where the complaint alleges the agreement to live apart, the mutual obligations thereunder, and the breach of the contract by the husband, but neither the agreement nor the complaint contains any statement of facts showing the necessity or cause for such separation." 19 Montana, 115. This case and the principle it sustains is referred to with approval in a full and learned note to *Baum v. Baum*, 109 Wis., 47, and reported in 83 American St. Reports at pages 854-866. The note in question, however, refers to an opinion by *Sanborn, J.*, in *Daniel v. Benedict*, 97 Fed. Rep., 367 and 369, as a "well-considered case," and in which a contrary view is taken, the case holding, among other things, that the relations existing between husband and wife as justifying a deed of this kind must be left to the determination of the parties interested, and that the "courts can not inquire into the sufficiency of the reasons as affecting the validity of the agreement."

It may be that our statutes, 2107, 2108, hereinafter more particularly referred to, resolve this question in favor of the Federal decision, and the difference appearing in these cases is not perhaps of the first importance, as it will be a very rare occurrence when a deed of the kind is made without adequate reason moving the parties—a condition assuredly present in the case before us.

It is further established that if the parties resume the conjugal relations the agreement will be rescinded. This has been directly held with us in *Smith v. King*, 107 N. C., 273, and is in accord with the weight of authority. *Zerminer v. Settle*, 124 N. Y., 37; *Tiffany on Persons and Domestic Relations*, 168. Again it is held, "That such an agreement must be reasonable, just and fair to the wife, having due regard to the conditions and circumstances of the parties at the time when made." *Garver v. Miller*, 16 Ohio State, 528; *Hutton v. Hutton*, 3 Pa. St., 100. The authorities also hold that these agreements, even when valid, do not affect the right of the parties to sue for a divorce for causes occurring either before or after they are entered. *Bailey v. Bailey*, 127 N. C., 474; notes to *Baum v. Baum*, 83 Am. St., 873. And while the American courts hold that deeds of separation are so far imperfect obligations that they will not be specifically enforced in that feature which contemplates or provides for the separation of the parties (*Aspinwall v. Aspinwall*, 49 N. J. Eq., *supra*), when a suit for divorce is entered and the same is obtained, the agreement, if otherwise valid and in so far as it affects the property rights involved, should be respected by the decree. *Galusha v. Galusha*, 116 N. Y., 635. On the record, therefore, we could not, as for-

merly, declare the deed void in law as against the present public policy of the State, and if the matter were presented only in that aspect, we would feel constrained to uphold the deed, or in any event remand the case for a fuller finding as to whether the instrument in question was a fair and just arrangement. We are of opinion, however, that the judgment of the lower court should be sustained for the reason on which His Honor, no doubt, acted, that the deed in question is not executed in the form and manner required by our law to make it a binding agreement. (That it was not in compliance with Revisal 2107, 2108.) . . .

No error.

Agreements in regard to divorce are invalid. Revisal, 1563; 6 R. C. L., 772; 9 Cyc., 519. As to separation agreements, see 9 Cyc., 520; Cartwright v. Cartwright, 3 De G. M. & G., 982, 6 E. R. C., 368; 6 R. C. L. 771.

Agreements in derogation of parental relation. There is "an utter want of authority on the part of a parent, whether father or mother, to sell a child, and for a selfish consideration commit it to the keeping of another." *In re Lewis*, 88—31; this does not interfere with apprenticing and adoption under the statute. See also 1 Page Cont., 426-429.

9. Contracts in restraint of trade.

(167) COWAN v. FAIRBROTHER,

118 N. C., 406, 24 S. E., 212, 33 L. R. A., 829, 54 A. S. R., 733—1896.

Civil action for an injunction to restrain defendant from violating contract. The defendant sold his paper, the *Durham Globe*, to one Jenkins for \$3,500, and in the contract agreed that neither he nor his wife should edit, print or conduct a newspaper or magazine nor be connected with one published anywhere in North Carolina for a period of ten years from January, 1894, without the consent of the purchaser or his assigns. Jenkins transferred the contract to George W. Watts, and Watts transferred a half interest to B. N. Duke, and the plaintiff holds under them.

The defendant purchased the *Durham Recorder*, and was preparing to edit it after July, 1895, and this application was made to restrain him from doing so. The defendant admitted the execution of the agreement, but alleged the publication of the other paper had been abandoned; that Jenkins really made the trade for Watts, who was hostile to the defendant's interests, and defendant would not have sold to him at all; that the said contract tended to restrict the freedom of the press; that it was in restraint of trade and contrary to public policy.

The judge granted a restraining order until the hearing, and defendant appealed.

AVERY, J. Where a person acquires a reputation for skill and learning in his profession as a lawyer or a physician, he often

creates an intangible but valuable property by winning the confidence of his patrons and securing immunity from successful competition for their business. So, where an editor, by reason of his style, his power, his pathos, his humor, his learning or of any gift or attainment, attracts subscribers solely by such personal qualities, he imparts a peculiar value to the good will and property of a newspaper which goes with him, to his injury, when he leaves it and lends the talents and accomplishments that have given it patronage and popularity to a rival journal in the same vicinity. Where he owns the press and plant the enhanced value so imparted by him becomes an element of his property with the same incidental power to dispose of it as attaches to any other of his acquisitions which has a market value. *Beal v. Chase*, 31 Mich., at p. 529. But it is not like other property which ordinarily passes by delivery or assignment to the purchaser. Neither an editor, a lawyer nor a physician can transfer to another his style, his learning or his manners. Either, however, can add to the chances of success and profit of another who embarks in the same business in the same field by withdrawing as a competitor. So that the one sells and the other buys something valuable, and the policy of the law limits the right to enter into such contracts of sale only to the extent that they are held to injure the public by restraining trade. The one sells his prospective patronage and the other buys the right to compete with all others for it and to be protected against competition from his vendor. The law intends that the one shall have the lawful authority to dispose of his right to compete, but restricts his power of disposition territorially so as to make it only coextensive with the right to protection on the part of the purchaser. To the extent that the contract covers territory from which the vendor has derived and will probably in the future derive no profit or patronage, it needlessly deprives the public of the benefit of open competition in useful business and of the services of him who sells without any possible advantage to his successor. When the reason upon which a law is founded ceases, the rule itself ceases to operate. The older cases in which the courts attempted to fix arbitrarily geographical bounds beyond which a contract to forbear from competition would not be enforced, have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent, as to time and territory, of the protection needed. *Nordenfelt v. The Maxim, etc., Co.*, appeal cases, 1894 (L. R.), 535; *Hitchcock v. Cocken*, 6 Ad. & E. (En. C. L. R.), at p. 106; *Hernshoff v. Bon-tenean*, 17 R. I. Rep., 3; *Benefit Co. v. Hospital Co.*, 11 L. R. A., 437; *Beal v. Chase*, 31 Mich., 490; *Tallis v. Tallis*, 1 El. & Bl., 391 (18 E. L. & E., 151); *Pregon Co. v. Minsor*, 20 Wallace,

64; 10 Am. & Eng. Enc., 947, note; 3 Am. & Eng. Enc., 885, note; Gibbs v. Gas Co., 130 U. S., 396.

Where the nature of the business was such that complete protection could not be otherwise afforded, the restraint upon the right to compete has been held good in one or more instances where it extended throughout the world, and in other cases where it applied to a State or to a boundary, including several States.

In *Nordenfelt v. Maxim, etc.*, *supra*, the plaintiff had covenanted with the respondent company "not to engage, except on behalf of such company, either directly or indirectly, in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company." On appeal to the House of Lords the case of *Horner v. Graves*, 7 Bing., 743, was cited and the validity of such contracts was declared to depend upon the question "whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." Lord *Herschell*, L. C., said further: "Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and if oppressive it is in the eye of the law unreasonable. The tendency in later cases has certainly been to allow a restriction in point of space, which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held to be too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in some cases be required and justifiable."

In *Beal v. Chase*, *supra*, at p. 530, Judge *Campbell* quotes with approval the language of Chief Justice *Chapman* in *Morse v. Morse*, 103 Mass., 77, where he said: "In this country there are periodical publications that have wide circulation, and it is obvious that a purchaser of the proprietorship can not afford to pay the full value unless he can have from the vendor a valid restriction against competition, which restriction shall be extensive as the interest requires, though it may cover the whole of a State or the whole of a country. The same would be true as to some books. For example, the author of a popular school book could not sell its proprietorship for its full value unless he could bind himself not to prepare another book which should be used in competition with it."

The rule which concedes the right to make the area in which the vendor is to be restricted from competition as broad as is necessary to afford ample protection to the purchaser, is subject to the qualification that no agreement will be upheld which is injurious

to the public interest. Nordenfelt case, *supra*, at p. 549. There are two familiar classes of contracts that will in no event be enforced because contrary to public policy, and these constitute exceptions to the general rule governing sales of the right of competition: 1. A *quasi* public corporation can not disable itself by contract from performing the public duties which it has undertaken to discharge in consideration of the privileges granted to it. *Logan v. R. R.*, 116 N. C., 940; *Gibbs v. Gas Co.*, 130 U. S., 410. 2. Any agreement in contravention of the common or statute law generally, or any combination "among those engaged in a business impressed with a public or *quasi* public character which is manifestly prejudicial to the public interest, is void as against public policy, and upon the same principle no agreement tending to create a monopoly or designed to utterly destroy fair competition amongst public carriers will be enforced." *State v. Oil Co.*, 34 Am. St. Rep., 541 (49 Ohio St., 137); *Emery v. Candle Co.*, 21 Am. St. Rep., 819, and note (47 Ohio St., 320); *Hooker v. Vandewater*, 47 Am. Dec., 258 (4 Denio, 349).

But the contract of which the plaintiff claims the benefit as assignee through John Jenkins, is one which in no way affects the public, unless it unreasonably deprives the people of the State of the benefit of the industry of the defendants, or unnecessarily precludes them from supporting their family by pursuing their occupation. *Oregon Nav. v. Windsor*, 20 Wall., at p. 68. The stipulation was that the defendant Fairbrother "would not edit, print or conduct a newspaper, nor be in any wise connected with one printed anywhere in the State of North Carolina, and that for a like period Mrs. Fairbrother shall not edit, print or conduct a newspaper or magazine, nor be in any wise connected with one anywhere in the county of Durham, said State, without the consent of said purchaser or his assignees." This contract was assigned to Watts and Duke by Jenkins, and the assignees who own the property have leased to the plaintiff Cowan, who is now publishing the *Globe* newspaper, and seeks to enjoin the defendant Al. Fairbrother and the other defendant from publishing another newspaper in Durham, as it is conceded they propose to do if the court should not interfere. Since the use of steam, space has been in a measure annihilated, and it is a fact, of which the courts may take notice, that a newspaper may be carried by mail to the most remote parts of the State within from 24 to 48 hours. So that, if there has ever been a time in the history of the State when an editor could not acquire a reputation for excellence in some particular line of that business, which would enable him to give a paper, with which he might be connected, popularity throughout its limits, there is no reason to doubt now that one, who would rid

himself of a competitor in that business, is not describing an unreasonable boundary when he extends the restriction against competition to the State lines. No better proof of that fact could be adduced than is set forth in the uncontradicted affidavits of the defendants themselves, that they injured their successor, John Jenkins, in the conduct of the Durham Globe, after the contract was entered into, by publishing a paper in Lynchburg, Va. If the right to compete for popularity as an editor may become valuable and pass by a contract of sale, like the good will of a newspaper, it follows necessarily as a logical sequence that the purchaser may sell and transfer to a third party the right to occupy a field vacated by a dangerous rival, and the transaction would be held valid for the same reason that renders the original sale enforceable. 3 Am. & Eng. Enc., 885, and note, with authorities collected; *Beal v. Chase*, *supra*; *Perkins v. Clay*, 54 N. H., 518; *Hedge v. Lowe*, 47 Iowa, 137; *Gampers v. Rochester*, 56 Pa. St., 194. It is settled law that such contracts, in restraint of trade, as are valid, may be enforced in equity, like other contracts, and that breaches of them will be restrained by injunction, on the ground that no other remedy is adequate. 3 Am. & Eng. Enc., 885, and note; *Thompson v. Andrus*, 73 Mich., 557. A covenant on the part of a publisher not to publish a paper is considered in the same light as a contract to sell a particular business, or the right to practice a profession in a given area, and courts of equity will interpose in order to prevent a violation of the one as well as of the other. 10 Am. & Eng. Enc., 947, and note.

The plaintiff's lessors swear that they had never abandoned at any time the purpose to continue the publication of the newspaper, and that during the suspension they kept up continual negotiations with that end in view. They say further that the suspension was prolonged by giving an option to one with whom they had good reason to expect they might conclude a contract to again issue it regularly.

A review of all the cases, where it has been held that parties have abandoned rights, will furnish no analogy to support the contention that the benefit of a contract, like that which is the subject of the action, must be deemed in law abandoned for failure to find a suitable editor for so short a time, especially where it appeared that reasonably diligent efforts were being made to have the business continued. The concealment by Jenkins of the fact that he was buying for another was not *per se* a fraudulent act, and there is no allegation on the part of the defendants that he practiced any fraud upon them. Fraud can not be inferred from the fact of buying property through an agent who is instructed to take title in his own name. If the defendants had set up a state

of facts, which in law amounted to fraud, and had asked the court to rescind the contract upon the principle that he who asks equity must do equity, they would have been required to offer to return the money received. In order to avail themselves of that remedy they should have brought suit to set aside the agreement upon the discovery of the fraud, if there was fraud, and should have offered to place the purchaser *in statu quo*. Cal., etc., Co. v. Wright, 8 Cal., 585, 592.

It is contended for defendants that the contract is illegal and void because it is in contravention of the provision of the Constitution (Art. I, sec. 20), which guarantees the freedom of the press. When the framers of our Constitution declared that the freedom of the press was one of the bulwarks of liberty, and therefore ought never to be restrained, but that every individual should be held responsible for the abuse of the same, they entertained no purpose to restrict the power of any person to dispose of anything of value, which, as the creature of his own mental or physical exertions, had become his property. This right is as much a fundamental one as is that to use the press without violation of reasonable laws intended to protect others from libel and slander. In its broadest sense, freedom of the press includes not only the exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion. Black Const. Law, pp. 472, 473; Cooley Const. Lim., pp. 517, 518; Ordinaux Const. Leg., p. 236, *et seq.*; 3 Story Const., p. 731. An indefinite number of authorities might be cited to show the universal interpretation placed upon the provision in the Constitution of the United States that the freedom of the press shall not be abridged, and upon similar clauses in State Constitutions. It has never been held anywhere that these provisions could be made engines of oppression by construing them as restrictions upon the right to sell anything of value, that is the creature of one's brain, provided society would not be made to suffer by the transaction. Upon a review of all the assignments we discover no error in the rulings below, and the judgment is therefore

Affirmed.

The same rule was applied to stipulations in regard to time, in *Kramer v. Old*, 119—1, which was an agreement not to engage in the milling business at a certain place after a certain date; it was held to be binding during the life of the vendor, and his taking stock in another milling company was a violation. Other instances of similar contracts: Photographer not to engage in business for ten years. *Baumgarten v. Broadway*, 77—8; druggist not to engage in business for three years, and selling his stock and taking a mortgage on it is not a violation. *Reeves v. Sprague*, 114—647; not to engage in livery business for three years, becoming manager of the business for the wife is a violation. *King v. Fountain*, 126—196; or to manage the business for others. *Baker v. Cor-*

don, 86—116; a contract not to practice medicine "in the town of Y and the surrounding territory," was enforced as to the town, but was too indefinite as to the rest. *Hauser v. Harding*, 126—295; not to carry on a certain business "in any territory now occupied by the other party, or from which he secures his patronage," is void for uncertainty. *Shute v. Heath*, 131—281; *Faust v. Rohr*, 166—187 (barber shop); *Diamond Match Co. v. Roeber*, 106 N. Y., 473, 60 A. R., 464; *Herreshoff v. Boutineau*, 17 R. I., 3, 33 A. S. R., 850, 8 L. R. A., 469; *Nordenfelt v. Maxim-Nordenfelt Co.*, 1894, App. Cas., 535, 6 E. R. C., 393, 413; *Allen Manfg. Co. v. Murphy*, 22 Ont. L. R., 539, 20 Ann. Cas., 657.

A stipulation on the face of a check that it will not be paid if presented through a certain bank, is valid and not in restraint of trade. *Bank v. Bank*, 118—783.

An instrument in which the grantor has "given, granted, bargained and sold unto N and his executors and assigns his active services, as a servant, for the full and entire term of five years, and the full and entire control of his person and labor during that time," is valid as a contract of service, a chose in action, but gives no property in the person. *Phillips v. Murphy*, 49—45.

For contracts in restraint of trade generally, see *Clark Cont.*, 305; 24 *Am. & Eng. Encyc.*, 842 *et seq.*; 1 *Page Cont.*, secs. 373-382; 9 *Cyc.*, 523; *Pollock Cont.*, 467; 6 *R. C. L.*, 785.

Restraint upon alienation.—Ever since the statute *quia emptores*, the right of alienation has been considered as an inseparable incident to an estate in fee, and except in some cases where the restriction is only partial, the law does not recognize nor enforce any condition which would directly or indirectly limit or destroy such a privilege—*iniquum est ingenuis hominibus non esse rerum alienationem*. *Hardy v. Galloway*, 111—p. 523; *Pritchard v. Bailey*, 113—p. 525; *Lattimer v. Waddell*, 119—370; *Pardue v. Givens*, 54—306; *Twitty v. Camp*, 62—61; *Wool v. Fleetwood*, 136—460. Parties will not be allowed to invent new modes of holding and enjoying property, nor to impress upon land a peculiar character which should follow it into all hands however remote. *School Com. v. Kesler*, 67—p. 447; *Blount v. Harvey*, 51—186; *Dick v. Pitchford*, 21—480. So a clause in a deed against liability for debts of the grantee is void. 129—p. 55; but it may be valid in compliance with the statute for spendthrift trusts. *Revisal*, 1588; *Mebane v. Mebane*, 39—131; *Vaughan v. Wise*, 152—31; *Christmas v. Winston*, 152—48; 6 *R. C. L.*, 808. A restraint upon alienation was imposed in giving effect to separate trust for married women. *Bisp. Eq.*, sec. 104.

Mortgages.—It is not a contravention of public policy for a vendee or mortgagor, where no improper advantage is taken, to surrender the right to the title, and hold as tenant of the vendor or mortgagee. *Taylor v. Taylor*, 112—27; *Crinkley v. Egerton*, 113—454; *Jones v. Jones*, 117—254. Mortgage on crops is restricted to the crops of the current year: to extend it further is against public policy. "Political economists tell us that even the civilized world is never more than one crop ahead of starvation, and countless thousands of the human race are in a day's march of it." *Clark, J.*, in *Loftin v. Hines*, 107—360, citing *Wooten v. Hill*, 98—52; *Masten v. Marlow*, 65—595; *State v. Garris*, 98—733; *Smith v. Coor*, 104—139; *Taylor v. Hodges*, 105—344; but this does not apply to other future interests. *Brown v. Dail*, 117—41; *Williams v. Chapman*, 118—943.

Homestead.—Certain contracts have been declared invalid, as against the policy of the law as to homestead and personal property exemptions; as a provision in a note not to claim such exemptions. *Benson v. Speed*, 74—544; *Branch v. Tomlinson*, 77—388. So as to conveyances without the joinder of the wife; if the marriage took place and the land was acquired before 1867, the husband may convey it without the joinder of the wife, except where the homestead is allotted. *Sutton v. Askew*, 66—172; *Bruce v. Strickland*, 81—267; *Jenkins v. Jenkins*, 82—208; *O'Kelly v. Williams*, 84—281; *Reeves v. Haynes*, 88—310; *Gilmore v. Bright*, 101—p. 386. If

the marriage has taken place or the land has been acquired since 1867, the husband may convey subject to the encumbrance of dower, without the joinder of the wife, unless he owes debts which may require the allotment of the homestead, then the wife must join. *Hughes v. Hodges*, 102—236; *Canfield v. Owens*, 130—641; 95—281; but see *Joyner v. Sugg*, 132—591, and *Davenport v. Fleming*, 154—291. Mortgages of household and kitchen furniture require the joinder of the wife, under *Revisal*, 1041; *Kelly v. Fleming*, 116—133.

10. Combinations, trusts and monopolies.

(168) CULP v. LOVE,

127 N. C., 457, 37 S. E., 476—1900.

FAIRCLOTH, C. J. The plaintiff demands damages for breach of contract. The defendants deny the alleged breach of contract, and rely upon the illegality of the contract as their defense. It is agreed by the parties that at the time the contract was made the plaintiff, Culp, was the agent and broker of the Cumberland Flour Mills for the sale of their flour, and the defendants were agents and brokers for the Sweetwater Flour Mills (located in Tennessee), for the sale of their flour, and that the flour of the respective companies were competitive brands of flour in the territory mentioned in the contract. In the contract, the plaintiff, Culp, for a valuable consideration, agrees with Love & Son, and Love & Co., not to sell meats, lard, and oil in certain territory, including several counties, for a certain number of months, and the said Love & Son and Love & Co. agreed not to sell flour at wholesale in the same territory and for the same period of time. They also agree to obtain for the plaintiff, Culp, the sale of the Sweetwater Mill Company's flour at all the towns on several railroad lines for the full term of this contract. It was further agreed that the plaintiff is not to neglect the sale of Cumberland Mills flour for that of Sweetwater Mills, nor "to push sale of said Sweetwater Mills flour further than it may be his interest to do." The plaintiff also agreed to divide with the other contracting parties his brokerage on sale of the Sweetwater Mills flour for the same term and in the same territory. The parties then agreed severally to forfeit and pay \$500 if either failed to perform his part of this contract. It appears from the evidence that defendants notified the Sweetwater Company that they had transferred their agency to sell flour to the plaintiff, but did not inform the Sweetwater Company of the true nature of said contract. The Sweetwater Company recognized the transferred agency on condition that the plaintiff handle its goods exclusively. In a few months the Sweetwater Company withdrew plaintiff's agency to sell its flour, and plaintiff sues for the penalty and damage. At the close of the plaintiff's evi-

dence, His Honor held that plaintiff could not recover. Plaintiff took a nonsuit and appealed.

Concealing the true nature of the contract under consideration was a fraud on the Sweetwater Company, and contrary to good morals, and the combination between the plaintiff and defendants to suppress and destroy competition in trade in the necessities of life was an imposition on the people and against public policy. The agreement was therefore illegal, and no court of justice will lend its aid to either party to enforce such an executory contract.

The objection of a party to an illegal contract does not sound well in his mouth. It is not for his sake that the objection is allowed, but it is founded in general principles of policy, of which he has the advantage by the accident of being sued by his confederate in wrongdoing. "An executory contract, the consideration of which is *contra bonos mores*, or against the public policy, or laws of the State, or in fraud of the State, or of any third person, can not be enforced in a court of justice." *Blythe v. Lovinggood*, 24 N. C., 20. In *Armstrong v. Toler*, 11 Wheat., 258, the court spoke in these words: "The principle of the rule is, that no man ought to be heard in a court of justice who seeks to enforce a contract founded in, or arising out of, moral or political turpitude." In Story's Ag., sec. 348, this clear distinction is laid down: "The distinction between the cases where a recovery can be had and the cases where a recovery can not be had of money connected with illegal transactions, which seems now best supported, is this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract, or transaction, or where it appears that he was privy to the original illegal contract, or transaction, then he is not entitled to recover any advance made by him connected with that contract. But when the advances have been made upon a new contract remotely connected with the original illegal contract, or transaction, but the title of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to recover." In the case before us, it is the illegal contract itself between the parties that we are asked to enforce. The proof shows that the defendants agreed not to compete with plaintiff in selling flour, leaving him to demand of the public his own price, and he agreeing not to sell meats, lards, and oil in their chosen territory, and to divide with them his brokerage on sales of the Sweetwater flour, and the court is called on by one party to make the other party pay money for failing to perform his part of this unlawful transaction. A and B agree to rob C. A does the work; B stands off and simply looks on, and then B calls on the court to make A divide the spoils; or, if they have stipulated that either one failing

to do his part of the nefarious work, shall forfeit and pay to the other \$500. Has any court of justice ever responded favorably to such request by either party? We do not mean to classify these parties with robbers, or to characterize their transaction other than according to the facts which they have brought out in their case. The intention of the parties is immaterial. They may have thought it permissible to make a sharp bargain at the expense of the public and injury to a third party, but we can not agree with, or help them, to do so. *King v. Winants*, 71 N. C., 469. Affirmed.

Trusts were defined and forbidden in Acts 1889, ch. 374; 1899, ch. 666; 1911, ch. 167; 1913, ch. 41; *Smith v. Ice Co.*, 159—151; *Fashion Co. v. Grant*, 165—453; *State v. Craft*, — N. C., —, 83 S. E., 772. As to trusts, etc., affecting interstate commerce, see *Sherman Act*, 1890, 26 Stat., 29; U. S. v. *Freight Asso.*, 166 U. S., 290; *Northern Securities Case*, 193 U. S., 197; *Standard Oil Case*, 221 U. S., 1, 34 L. R. A. (N. S.), 834, Ann. Cas., 1912 D, 734; *American Tobacco Co. Case*, 221 U. S., 106; 20 Am. & Eng. Encyc., 844; 64 L. R. A., 689; *Clark Cont.*, 312; *Page Cont.*, 432; 8 Cyc., 634; 27 Cyc., 819.

"Perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed." Const., Art. 1, sec. 31, construed in *Thrift v. Elizabeth City*, 122—31; *McRee v. R. R.*, 47—186; *Simonton v. Lanier*, 71—498; *Toll Bridge v. Comrs.*, 81—491; *Toll Bridge v. Flowers*, 110—386; *Robinson v. Lamb*, 126—492; *Spease Ferry*, 138—219.

Combinations or consolidation of railroads may be allowed by statute. *Spencer v. R. R.*, 137—107.

Labor unions, etc.—Capital either in the form of money or skill may combine for lawful purposes; where it seeks to effectuate its purpose by means of violence or fraud, or by such means conspires to prevent any person from conducting his business in his own way, or from employing such persons as he may prefer, or by preventing any persons from being employed, the courts will interfere. *Van Pelt's Case*, 136—633; 65 L. R. A., 342; 69 L. R. A., 90.

11. Exemption from liability for negligence.

(169) CAPEHART v. R. R.,

81 N. C., 438—1879.

Civil action for damages to cotton shipped over defendant's road and alleged to have been damaged by defendant's negligence. The defendant denied negligence and set up as further defense a special stipulation in the bill of lading "that in case any claim should arise from any damage or loss of articles mentioned in this receipt while *in transitu*, or before delivery, the extent of such damage or loss shall be adjusted in the presence of an officer of the line before the same be removed from the station, and such claim must be sent within thirty days after the damage or loss occurred, to James McCarrick, Trace Agent, Portsmouth, Virginia, who has authority to settle such claims." The jury found that the cotton was damaged by the negligence of the defendant to the amount of \$1,225, but that the stipulation above mentioned had not been com-

plied with. There was a judgment for the defendant, and plaintiff appealed.

ASHE, J. The only question presented for our consideration in this case is, did the court below render the proper judgment upon the finding of the jury? We think it did not, and that the judgment should have been in favor of the plaintiff.

The jury found by their verdict the facts that the cotton when delivered to the defendant was in good order; that when delivered to plaintiff's consignee it was wet, muddy and damaged; that it was damaged while in the possession of the defendant by its negligence or that of its agents or servants; that the damage to the cotton was not contributed to in any part by the negligence of the plaintiff, and that the amount of the damage to the cotton was twelve hundred and twenty-five dollars.

Upon the finding of these facts, the plaintiff was clearly entitled to a verdict for the amount of the damages ascertained by the jury. The defendant was a common carrier and liable for all damages of goods entrusted to it for transportation, during the carriage, from whatsoever cause, except from the act of God or the public enemy. It was an insurer and was liable without any negligence on its part.

But the jury also found that there was a special contract, and the defendant insisted, and so the court held, that as the plaintiff did not comply with the conditions of the contract, it was exonerated from all liability for the damages resulting from its negligence. The right of a common carrier to limit or diminish his general liability by a special contract has given rise to as much, if not more, discussion and contrariety of opinion, than any other question of law. Most of the more recent cases held that common carriers may restrict their general liability by notice brought home to the knowledge of the owner of the goods, before or at the time of the delivery to the carrier, if assented to by the owner. 2 Redfield on Railways, 100. And it has been held that the receipt of the bill of lading by the shipper or his agent with restrictive stipulations annexed, is presumptive evidence of assent; though on this there has been a diversity of opinion, as upon every other branch of this subject; some of the courts going so far as to hold that a bill of lading with the receipt in large letters and the stipulations in small print, is an insufficient notice. However this may be, it is certainly a mode of giving notice that is not to be commended.

The jury have found that there was a special contract, and the inquiry is, what effect has that upon the general liability of the defendant as a common carrier? Has the plaintiff lost his right of action against the defendant by reason of his having failed to have the extent of the damage adjusted in presence of an officer

of the line before the removal of the cotton, and not presenting his claim for damages within thirty days, as prescribed in the stipulations? The leading case on this subject is *Nav. Co. v. Bank*, 6 How. (U. S.), 344, which Mr. Redfield, in his valuable work on the law of railways speaks of, as giving a fair exposition of the American law upon the subject. In that case, Mr. Justice *Nelson* said: "The special agreement in this case under which the goods were shipped, provided that they should be conveyed at the risk of Harnden, and that the respondents were not to be responsible to him or his employees in any event for loss or damage. The language is general and broad, and might very well comprehend every description of risk incident to the shipping. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care. . . . Although he was allowed to exempt himself from losses arising out of events and accidents, against which he was a sort of insurer, yet as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility, as that which attaches to a private person engaged casually in the like occupation, and was, therefore, bound to use ordinary care in the custody of the goods and their delivery."

To the same effect is the case of *Bank v. Express Co.*, 93 U. S., 174, which was a case where the bill of lading had stipulations or conditions attached restricting the liability of the company, among which was one "that the company would not be liable for any such loss, unless the claim therefor should be made in writing at this office within thirty days from the date, in a statement to which this receipt shall be attached." The court there held that an exception in its bill of lading that the express company is not to be liable in any manner or to any extent for any loss, damage or detention of its contents, or of any portion thereof, occasioned by fire, does not excuse the company from liability for the loss of such package by fire if caused by the negligence of a railroad company, to which the former had confided a part of the duty it had assumed. Public policy demands that the right of the owner to absolute security against the negligence of the carrier and all persons engaged in performing his duty, shall not be taken away by any reservation in his receipt, or by any arrangement between them and the performing company.

In *Wyld v. Pinkford*, 8 M. & W., 443, the Court of Exchequer decided that the carrier, notwithstanding his notice, was bound to use ordinary care. In *Bodenham v. Bennett*, 4 Price, 31, followed and approved by *Birkett v. Sillan*, 2 B. & A., 356, it was

decided that notices restricting the liability of a common carrier were only intended to exempt carriers from extraordinary events, and were not meant to exempt from due ordinary care.

We might cite a number of cases in the courts of different States of this country, establishing the principle that a common carrier can not by special notice or contract exempt himself from the exercise of ordinary care and prudence in the carriage of goods. In addition to those already cited, we refer to the cases of *R. R. v. Barldauff*, 16 Penn. St., 67; *Dorr v. Nav. Co.*, 4 Sandf., 136; *Parsons v. Monteith*, 13 Barb., 353; *Bingham v. Rogers, W. & S.*, 495; *Jones v. Voorhees*, 10 Ohio, 145; *School Dist. v. R. R.*, 102 Mass., 552; *Story on Bailments*, sec. 571.

But we are not without authorities in our own State maintaining the same doctrine. This court held in the case of *Smith v. R. R.*, 64 N. C., 235, "that although a common carrier can not by a general notice to such effect free itself from all liability for property by it transported, yet by notice brought to the knowledge of the owner it may reasonably qualify its liability as common carrier, and in such case it will remain liable for want of ordinary care, *i. e.*, negligence." And to the same effect is the case of *Glenn v. R. R.*, 63 N. C., 510.

From the examination of the authorities on this subject, we conclude that a common carrier can not by special notice brought home to the knowledge of the owner of goods, much less by general notice, nor by contract even, exonerate himself from the duty to exercise ordinary care and prudence in the transportation of goods; and we deduce from the principles enunciated by them the following propositions:

1. That a common carrier being an insurer against all losses and damages, except those occurring from the act of God or the public enemy, may by special notice brought to the knowledge of the owner of the goods delivered for transportation, or by contract, restrict his liability as an insurer, where there is no negligence on his part.

2. That he can not by contract even limit his responsibility for loss or damage resulting from his want of the due exercise of ordinary care.

And now that railways have become so numerous, and as carriers have absorbed so much of that class of business which is so important to our increasing commerce and the more frequent intercourse of our people, to hold a different doctrine would lead to the abolition of those safeguards of life and property, which public policy demands shall be preserved and protected.

The jury having found that there was negligence on the part of defendant, we must take that as a fact, and adhering to the prin-

ciples established in the cases cited, we are of the opinion that the defendant's liability for damages is not diminished or affected in any way by the notice or contract annexed to the bill of lading, not even by the stipulation that the damages must be adjusted before the removal of the goods from the station and the presentation of the claim for payment within thirty days; for the stipulation must be reasonable; and we do not think it is reasonable to require the consignees of a carload of cotton to cut into the bales before they are received to ascertain whether they have been seriously damaged. "A contract restricting the responsibility of the carrier must be reasonable in itself, and not calculated to ensnare or defraud the other party. A contract requiring notice of losses in thirty days is not reasonable." *Express Co. v. Reagan*, 22 Ind., 21; *Express Co. v. Caperton*, 44 Ala., 101; *Place v. Express Co.*, 2 Hill, 19.

Our conclusion is that the judgment rendered in the court below was not warranted by the finding of the jury. There is error. Judgment must be rendered in this court in behalf of the plaintiff for the amount of the damages assessed by the jury.

Error.

Reversed, and judgment here.

See same case, 77—355. See also *Phifer v. R. R.*, 88—388; *Mills v. R. R.*, 119—693; *Thomas v. R. R.*, 131—590; *Kime v. R. R.*, 160—459.

A railroad company can not exempt itself from liability for negligence even for one injured while riding on an unauthorized pass. *McNeill v. R. R.*, 132—510, 135—682; or in case of a clergyman's permit, with a provision that the holder assumes all risk. *Marable v. R. R.*, 132—557. Where the value of the article is stated in the bill of lading, it is held in North Carolina that this does not limit the liability of the company to the amount specified where the loss results from negligence. *Everett v. R. R.*, 138—68; *McConnell v. R. R.*, 144—87; *Stringfield v. R. R.*, 152—125; *Kissenger v. Fitzgerald*, 152—247; *Breeding Asso. v. R. R.*, 152—345; *Harden v. R. R.*, 157—238; *Stehli v. Express Co.*, 160—493; *Cooper v. R. R.*, 161—400; *Pace Mule Co. v. R. R.*, 160—215, overruling *Jones v. R. R.*, 148—583, and *Winslow v. R. R.*, 151—250. The *Pace Mule Co.* case was reversed by the Supreme Court of U. S. in 234 U. S., 751, as to interstate shipments; see *Adams Express Co. v. Croninger*, 226 U. S., 491; *Mo., etc., R. R. v. Harriman*, 227 U. S., 657. The majority rule seems to be generally in favor of the limitation. *Ballou v. Earle*, 17 R. I., 441, 22 Atl., 1113, 14 L. R. A., 433; *Lockwood's case*, 17 Wall., 357; *Hart v. Penn. R. R.*, 112 U. S., 331; *Penn. R. R. v. Hughes*, 191 U. S., 477; *Donlon v. So. Pac. R. R.*, 151 Cal., 763, 12 Ann. Cas., 1133, and note.

By special contract and for valuable consideration, a common carrier may limit its common law liability, provided such limitations are reasonable; and they must be strictly construed. *Gardner v. R. R.*, 127—293. Unreasonable restrictions: Transportation at company's convenience, *Branch v. R. R.*, 88—573; "subject to delay," *Parker v. R. R.*, 133—335; claim for damages must be made in thirty days,—but it is intimated that sixty days would be reasonable. *Mfg. Co. v. R. R.*, 128—280; *Cigar Co. v. Express Co.*, 120—348; *Watch Case Co. v. Express Co.*, 120—351; an agreement that as a condition precedent to plaintiff's right to recover, he should give notice to the company before the property is removed, is held valid, *Selby v. R. R.*, 113—p. 594; but this does not exempt from liability for negligence, *Hinkle v. R. R.*, 126—932; a condition that demand for damages shall be made in writing is reasonable, but compliance may be waived, *Wood v. R. R.*, 118—1056; *Kime v. R. R.*, 153—398, 156—451; *Austin v. R. R.*, 151—137; *Southerland v. R. R.*, 158—327; *Duvall v. R. R.*, 167—24; *Forney v. R. R.*, 167—641; reasonable

time for shipment is five days under the statute, *McGowan v. R. R.*, 95—417. See Revisal, 2632. While a common carrier can not by contract exempt itself from liability for negligence, it may make a contract with a third person to indemnify it against such loss. *R. R. v. Main*, 132—445. As to burden of proof in case of special contract limiting liability, see *Mitchell v. R. R.*, 124—236.

Injury to servant.—"It would seem that the government owes it to the servant of a carrier to give to him the same protection of life and limb as to the passenger, by declaring void an agreement, in consideration of being employed, to excuse the company for negligence when it causes death, and it has been so held." *Mason v. R. R.*, 111—p. 498. Under the State Employers' Liability Act, Rev. 2646, Acts 1913, ch. 6, and the Federal Employers' Liability Act, 1908, ch. 149, 35 Stat. L., 65, a contract to exempt a railroad company from liability for injury to a servant is void. Where compensation has been provided, as in a relief department, this does not discharge from liability, but may diminish the amount of the recovery. *Barden v. R. R.*, 152—318; *King v. R. R.*, 157—44; *Burnett v. R. R.*, 163—186; *Nelson v. R. R.*, 157—194, 167—185; *Frank v. Newport Min. Co.*, 148 Mich., 637, 112 N. W., 504, 11 L. R. A. (N. S.), 182. Whether a contract exempting from liability from negligence will be valid in other cases where the service is not affected by a duty to the public, is not clearly settled. In *Engine Co. v. Paschal*, 151—27, it is said such contracts may be valid, in the absence of fraud or bad faith; while in other cases they have been held against public policy. 6 R. C. L., 727, 729; *Johnston v. Fargo*, 184 N. Y., 379, 77 N. E., 388, 7 L. R. A. (N. S.), 537, 6 Ann. Cas., 1.

Warehousemen are not insurers, as are common carriers, but they are liable for negligence, notwithstanding a provision to the contrary in their charter. *Motley v. Warehouse Co.*, 122—347.

Telegraph Company is liable for negligence, and a condition limiting liability unless the message is repeated, and also to fifty times the amount paid for the message, is void. *Brown v. Telegraph Co.*, 111—187 (overruling *Lassiter v. Tel. Co.*, 89—336; *Pegram v. Tel. Co.*, 97—57; *Cannon v. Tel. Co.*, 100—300; *Thompson v. Tel. Co.*, 107—449); *Sherrill v. Tel. Co.*, 116—655; *Williamson v. Tel. Co.*, 151—223; *Rhyne v. Tel. Co.*, 164—394; *Sykes v. Tel. Co.*, 150—431; *Lytle v. Tel. Co.*, 165—504; the same rule applies to all public service corporations. *Turner v. Power Co.*, 154—131.

Banks receiving checks for collection, and stipulating that items outside of the home town are remitted at owner's risk until payment is received, do not thereby exempt themselves from liability for negligence. *Bank v. Floyd*, 142—187.

Associated lines of railroads.—As to their liability see *Phifer v. R. R.*, 89—311; *Phillips v. R. R.*, 78—294; *Dixon v. R. R.*, 74—538; *Lindley v. R. R.*, 88—547; *Wineberry v. R. R.*, 91—31; *Mills v. R. R.*, 119—693; *Knott v. R. R.*, 98—73; *Charleston v. R. R.*, 143—43; *Meredith v. R. R.*, 137—478; *McConnell v. R. R.*, 163—504. See also *Hepburn Act* and *Carmack Act*, Fed. Stat. Ann., 1909, Sup., 273. Exempting from negligence, see 1 Page Cont., secs. 359-372; 9 Cyc., 543; *Clark Cont.*, 318; 5 Am. & Eng. Encyc., 308; 6 R. C. L., 727.

Sec. 4. Effect of illegality and remedies.

1. Divisible and indivisible contracts.

(170) BRANNOCK v. BRANNOCK,

32 N. C., 428—1849.

Action of ejectment. The plaintiff claimed the land under a sheriff's deed in execution sale, and the defendant claimed under a deed of trust executed by the judgment debtor prior to the judgment; some of the debts secured in the deed were usurious, and others were valid. There was a judgment for the defendant, and plaintiff appealed.

PEARSON, J. The only question is, whether a deed of trust is void, which was made to secure several debts due to different individuals, some of which debts are usurious. It is not void. The estate passed, and is a security for the debts not tainted with usury. The declarations of trust, only in reference to the usurious debts, are void.

In *Shober v. Hauser*, 20 N. C., 222, it is held that a deed of trust, made to secure a usurious debt, is void; in that case there was but one debt secured, which debt being usurious, the deed could only operate as an "assurance for a usurious debt," and was properly held to be void.

But in this case there are several debts due to different individuals; some of them are not tainted with usury, and are in no wise connected with those that are. The operation of the deed was to pass the legal estate, with a separate declaration of trust, for each of the debts therein enumerated. There can be no reason why the declaration of trust, in reference to one debt, may not stand, and the declaration of trust in reference to another be held void. So if a deed contains a declaration of trust, in favor of several debts, one of which is feigned, and there be no connection or combination between the creditors, to whom the true debts are due, and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declaration of trust, in favor of the true debts, may not stand and the feigned debt be treated as a nullity.

If a bond secures the performance of several covenants or conditions, some of which are legal and the others void, it is valid, so far as respects the conditions that are legal, provided they be separated from and are not dependent on the illegal. But if a contract be made on several considerations, one of which is illegal, the whole contract will be void. The difference is, that every part of the contract is induced and affected by the illegal consideration;

whereas, in cases where the consideration is tainted by no illegality, but some of the debts are illegal, the illegality of such as are bad does not communicate itself to or contaminate those which are good, except where from some peculiarity in the contract its parts are inseparable, or dependent upon one another. 1 Smith's Leading Cases, 284, note to Collins v. Blantern and the cases cited. Here the consideration which raised the use, for the purpose of the conveyance, is merely nominal. The debts secured are distinct, due to different individuals and in no way connected with, or dependent on, one another—the deed is valid so far as respects the good debts. It would be unreasonable and defeat the object of deeds of trust, if they are to be declared void, and honest creditors deprived of their security for debts, because the debtor, without their knowledge or concurrence, may insert an usurious or feigned debt. No one would bid at a trustee's sale, if he could be deprived of his title, by showing that one of many enumerated debts was tainted with usury. The case of Harrison v. Hanent, 5 Taunt., 780, was relied on for the plaintiff. The case is not an authority against the conclusion above announced, but tends, we think, greatly to confirm its correctness. The son of the defendant owed several debts to the plaintiffs, some of which were usurious; and wishing to get a further advance agreed to draw three bills upon his father as a security for the whole. The bills were accepted and the first paid; but in a suit on the second it was held to be void, because it was a security for the amount, in which were included some usurious debts. Although it was urged that the amount of the first and second bills would not exceed the amount of the good debts, the reply was that, if the plaintiff was allowed to recover, he could apply the amount to the bad debts and sue the son on the good debts; that it was the same as if the son had given his note, with his father as surety for the whole debt. The contract was entire. The security was given as well for the illegal as the legal part; they are connected together and can not be separated; which distinguishes it from this case. Here the debts are [not] connected; one may be paid and another rejected. It is the duty of the trustee to pay the good and reject the bad ones. It is the same as if a separate deed of trust for each creditor had been executed.

Per Curiam.

Judgment affirmed.

This case has been approved in Morris v. Pearson, 79—253, in which all the cases are discussed. See also Ballard v. Green, 118—p. 392, and Brown v. Nimocks, 124—417.

There is no difference in this respect in a contract *malum in se* and one *malum prohibitum*. Guy v. McLain, 12—47; Weith v. Wilmington, 68—24.

See 1 Page Cont., secs. 509, 510; 9 Cyc., 564; Clark Cont., 324; 15 Am. & Eng. Encyc., 988; 6 R. C. L., 814; Tate v. Gaines, 105 Pac., 193, 26 L. R. A. (N. S.), 106; State v. Wilson, 73 Kan., 343, 83 Pac., 737, 117 A. S. R., 499.

LINDSAY v. SMITH,

Ante (158).

(171) ANNUITY CO. v. COSTNER,

149 N. C., 293, 63 S. E., 304—1908.

Action was brought on a note of \$144, given by defendant for the premium on three life insurance policies. At the time the note was executed it was agreed between the plaintiff and defendant that in consideration of certain services specified, the defendant should be selected as one of not exceeding 600 persons who should receive as compensation for such services a renewal commission from a fund to be set aside for that purpose. Defendant contended that this provision was illegal in that it was a discrimination, and rendered the whole contract void. Judgment for plaintiff, and defendant appealed.

CONNOR, J. The sole question presented is, whether by reason of the provisions of sec. 4775, Revisal, forbidding insurance companies from giving any special benefits, or any rebate of premiums on policies to one person not given to all others of the "same class and expectation of life," the entire contract, policy and note are void. Conceding that the contract, set out in the record, violates the provisions of the statute, it does not follow that the policy of insurance issued, or the note given for premiums are void. It is not always easy to distinguish between those cases in which the illegal element enters into and so permeates the entire contract as to render it void, and those in which two covenants or obligations are assumed which are either severable, or which the parties have so severed that the valid may be separated from the invalid, and enforced. Pollock thus states the law: "A lawful promise, made for a lawful consideration, is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration." Again: "Where a transaction, partly valid and partly not, is deliberately separated by the parties into two agreements, one expressing the valid and the other the invalid part, then a party who is called upon to perform his part of that agreement which is, on the face of it, invalid, can not be heard to say that the transaction, as a whole, is unlawful and void." Contracts, 842 and 843. In *Price v. Green*, 16 M. & W. (Exch.), 346, the defendant, for one consideration, covenanted not to engage in trade in the cities of London and Westminster, or within 600 miles of either of said cities. The action was for breach of the first covenant. *Patterson, J.*, held that the two were divisible, and sustained the action for breach of the valid covenant, saying,

"No doubt the covenant formed the consideration for the payment of 1,500 pounds, and possibly Gosnell would not have given so large a sum, unless the prohibition to trade had been as extensive as, by the whole of the covenant, it is made to be; but this is conjecture only. . . . It should be observed that the restriction as to 600 miles from London and Westminster is only void and not illegal." In the same case, reported in 13 M. & W., 695, *Pollock*, C. B., said: "It is not like a contract to do an illegal act; it is merely a covenant which the law will not enforce; but the party may perform it if he choose."

In *Fishnell v. Gray*, 60 N. J. L., 5, *Beasley*, C. J., said: "The proposition posited is, that as this part of the consideration of defendant's promise is illegal, the entire contract falls and that no part of it can be enforced." After discussing the question, he says: "As a consideration it was, in the earlier cases, treated as devoid of legal force, but it was deemed to vitiate all other considerations with which it was blended. On this theory an agreement to abstain generally from carrying on a certain business, as in the present case, was treated as though it were an agreement to commit a crime, and, as a consequence, it illegalized everything that it touched. But this view, it has since been perceived, is unnecessarily stringent and is, in fact, quite unreasonable. There is nothing immoral or criminal in a stipulation not to engage in a certain business. A man may bind himself to such an abstention without incurring any legal penalty. The only effect is that such an engagement can not be enforced, either at law or in equity. And this is the aspect in which it is regarded by modern authorities." The same view is stated by Page in his recent work on Contracts, 1 vol., sec. 509: "If A makes a promise to B, consisting of two or more covenants, upon a valuable and legal consideration, and one of the covenants made by A is illegal, and the other is legal, the question of whether the legal covenant can be enforced or not, depends on whether the contract is severable or not. If the contract is severable, consisting in legal effect of distinct contracts, the legal covenant can be enforced." For this statement of the law, the author cites a large number of decided cases.

The distinction is sometimes made between contracts *malum in se* and *malum prohibitum*, but this is not recognized with us. When the statute prohibiting a contract declares it to be void, as in the statute against gambling in "futures," no enforceable promise or obligation can grow out of it. *Burns v. Tomlinson*, 147 N. C., 645. The statute, sec. 4775, does not declare that contracts made in violation of its provisions shall be void. There is nothing immoral in the contract made by the plaintiff with the defendant,

and it is not clear that it comes within the statutory prohibition. *Muller v. Ins. Co.*, 60 N. E., 958. It seems that, for what the company regarded a valuable consideration, it proposed to give to a class of 600 of its policyholders certain benefits. However this may be, it is manifest that the note was executed for the exact amount of the regular premiums charged all persons of defendant's age for that kind of policy. It would hardly be contended that the policy was void and that, if defendant had died within the year, the company would not have been compelled to pay it. The company, in consideration of the payment of the premium or the execution of the note, made two separate and distinct contracts with the defendant, assuming entirely different obligations. One was that, upon the payment of the premiums named in the policy, at stated annual periods during his life, it would, upon his death, pay to the beneficiary named, the amount of the policy. This was a valid, binding contract. At the same time, the company made a separate contract with the defendant that, upon the payment of the second annual premium and the one due each year thereafter, it would deduct certain amounts by way of renewal commissions, which should be credited on said premiums. Assuming, for the purposes of this decision, that this contract is void, that is, not enforceable by reason of sec. 4775, Revisal, we are unable to perceive how it can affect the validity of the contract of insurance or the promise to pay the premium. It would be a strange result if a statute, passed to prohibit rebates or commissions being paid to the insured, should invalidate the policies issued to persons who pay the premiums, or invalidate the notes given for them.

The defendant says that he learned, in a few days after the policy was issued, that the contract was void, but that he retained it in his safe until the next premium fell due, when he let it lapse. He was certainly insured for one year, and this was a valuable consideration to support his promise to pay the premiums. *Roddey v. Talbott*, 115 N. C., 293. To hold that, upon his own evidence, he may, in the light of the facts in this case, take the consideration and then repudiate his promise to pay, would subject the court to the charge of violating "the dictates of justice." (The court then distinguishes the cases of *Lindsay v. Smith*, 78 N. C., 328, and *Covington v. Threadgill*, 88 N. C., 186.) No error.

A contract to purchase horses, etc., and to carry the mail for the Confederate Government, was an indivisible contract, and void. *Clemmons v. Hampton*, 64—264. If a single contract is made on several considerations, any one of which is illegal, the whole is void. *Covington v. Threadgill*, 88—186. Where there was a stipulation in a deed of trust for creditors, preferring such of the creditors as would receive one-half of their claims and release the other half, it was held that this vitiates the whole deed, and the creditors who are presumed to have accepted the benefit of the deed are held

to concur, so that the fraudulent intent enters into the whole instrument; "like one rotten egg broken into the same bowl with many good ones." *Palmer v. Giles*, 58—75. 1 Page Cont., secs. 507, 508; *Clark Cont.*, 322; 15 Am. & Eng. Encyc., 988; 9 Cyc., 564; 6 R. C. L., 693; *Featherstone v. Hutchinson*, Cro. Eliz., 199, 6 E. R. C., 325; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn., 188, 16 A. S. R., 695. Where a foreign corporation does not comply with the local law, see *Ins. Co. v. Edwards*, 124—116; *Howard v. Ins. Co.*, 125—49; *Fisher v. Ins. Co.*, 136—217.

2. Intention of the parties.

(172) ELECTROVA CO. v. INSURANCE CO.,

156 N. C., 232, 72 S. E., 306, 35 L. R. A. (N. S.), 1216—1911.

This was an action upon an insurance policy. The plaintiff was engaged in selling pianos which play by mechanical means when a nickel is placed in a slot. The defendant issued a "floating policy" to the plaintiff upon all instruments in Greenville and Kinston. The plaintiff placed a piano in a house of ill-fame, kept by one Mabel Page, for trial and with a view to selling it to her, and while there the piano was destroyed by fire. There was a judgment for the defendant, and the plaintiff appealed.

Reversed.

BROWN, J. . . . The defense is that the contract of insurance between plaintiff and defendant was void because the piano had been placed in a house of ill-fame with a view to selling it to the proprietress. It is urged that such a transaction is against public policy to such an extent that it avoids the policy of insurance on the piano. The defense has the merit of novelty, at least. But we think it must fail for two reasons: 1. The theory of the defense is that the piano was insured in aid and furtherance of a contract or agreement entered into between the plaintiff and Mabel Page, which was against public policy.

The defendant fails to establish any contract or agreement of any sort between the plaintiff and Page. There was no contract or agreement to sell the piano. It was placed in her house in the hope of a sale. The title and right of possession was never out of plaintiffs. They had the right to remove it at any moment, and by legal process if necessary. The instrument was not placed in the house to earn nickels for plaintiffs, although Rackley found some in its remains. But if it had been placed there, as slot machines frequently are placed in public places, to earn nickels for the owner, the plaintiffs would not thereby have forfeited their title to the property. The insurance policy was not taken out in aid and furtherance of a contract and agreement entered into between plaintiffs and Mabel Page, for there was none entered into, moral or immoral. The rule of law which the defendant invokes

applies only to executory contracts or agreements which are to be performed in the future, and not to transactions which are past and closed. *Brown v. Kinsey*, 81 N. C., 245.

2. The effect upon the public interest, under the facts of this case, is too remote entirely to justify a court in refusing its aid to plaintiff to enforce the payment of the policy.

The reason that some contracts and agreements are declared void as against public policy is because the enforcement of them by the courts would have a direct tendency to injure the public good. *Harrell v. Watson*, 63 N. C., 454; *Brown v. Kinsey*, *supra*; *Collins v. Blantern*, 1 Smith L. Cas., 153. It has been said by learned judges and text-writers that a court should declare a contract void as against public policy only when the case is clear and free from doubt and the injury to the public is substantial and not theoretical or problematical. *Navigation Co. v. Dumas*, 181 Fed., 782; *Cox v. Hughes*, 102 Pac. R., 956.

Where the contract or agreement sought to be enforced has no direct connection with the illegal act, but is collateral to it, then the contract is not tainted or affected by the illegal act. The principle of law is thus stated by Chief Justice Marshall: "Where a contract grows immediately out of and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act." Again the Chief Justice expresses the same principle in simpler language when he says: "A new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful." *Armstrong v. Toler*, 24 U. S., 257. Where the connection between the illegal act and the agreement sought to be enforced is not direct, but remote, the latter will be upheld.

The true test of the illegality of a contract is thus stated by this court in *S. v. Bevers*, 86 N. C., 595: "The principle upon which courts refuse their aid in such cases is this: No court will lend assistance to one who founds his cause of action upon an illegal act. . . . But to put this principle into operation in any particular case it must appear that the very party who is seeking aid from the court participated in the unlawful purpose. Indeed, it is said that the very test of its application is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction, to which he himself was a party." It has been also held by other jurisdictions that if the plaintiff does not require

the aid of an illegal transaction to establish his claim, he may recover. *In re Bunch Co.*, 180 Fed., 519, and cases cited; *Fruit Association v. Snelling*, 141 Cal., 713.

There are cases which hold that if this piano had been sold to Mabel Page to enable her to better carry on and conduct a house of ill-fame, the seller could not recover in action for the purchase price. *Furniture Co. v. Alstein*, 51 L. R. A., 889; *Reed v. Brewer*, 90 Tex., 148. Those cases are founded upon the principle we have adverted to, that the plaintiff could not make out his case without resorting to and putting in evidence an illegal transaction. But nowhere can there be found a case, so far as we are advised, which holds that if Mabel Page had purchased the piano she could not have lawfully insured it, and recovered the insurance had it been destroyed by fire.

It is very generally held to be vicious, and in some States it is made a crime for the owner of a house to lease it for immoral purposes. Yet it has never been held that if the house, so leased, is insured and destroyed by fire, the owner can not recover on his policies. There is no direct connection between the immoral or unlawful act of leasing and the lawful and (so far as the public is concerned) harmless act of insuring. The evil effect upon public interests is entirely too remote and problematical to avoid the lawful contract of insurance. . . .

No public interest is involved, much less injured, by the enforcement of this contract. And we think what is said by the Supreme Court of California in the case cited may well apply to this: "Parties should be careful about making contracts, but when once made the courts will not relieve them for light or trivial reasons. Public policy is better served by leaving the parties and their rights to be measured by the terms of their contract." Upon the issues as answered by the jury the plaintiff, the Electrova Company, is entitled to judgment. . . .

In *Phillips v. Hooker*, 62—p. 205, where the question was whether Confederate money as a consideration rendered the contract void, Reade, J., gives the following as to intent: "A contract is not void merely because it tends to promote illegal or immoral purposes" (citing 11 Wheat. U. S., 258). "A contract for the sale of a house and lot is not vitiated by the fact that the vendor knew that the vendee intended it for an immoral purpose" (a home for his mistress). *Armfield v. Tate*, 29—259. "A sale of goods is not void, although the seller knows that they are wanted for illegal purposes, unless he has a part in the illegal purpose" (quoting *Mansfield, C. J.*). "The mere selling goods knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment." . . . "If the illegal use to be made of the goods enters into the contract, and forms the motive or inducement in the mind of the vendor or lender to the sale or loan, then he can not recover, provided the goods are used to carry out the contemplated design; but bare knowledge on the part of the vendor that the vendee intends to put the goods or money to an illegal use, will not vitiate the sale or loan" (citing *Dater v. Earl*, 3 Gray, 482). "Where the vendor

sold goods knowing that the vendee intended to smuggle them, he can recover, but not if he does any act to assist in carrying out the design." But in *Kingsbury v. Fleming*, 66—524, it is said that if money is loaned for an illegal purpose, the fact that it is not so used is immaterial. See numerous cases cited above under contracts affecting the government. There is a further distinction sometimes made between contracts *mala in se* and *mala prohibita*, in that mere knowledge in the former is sufficient; so also as to one constituting a serious crime and one constituting a minor offense. *Clark Cont.*, 329. See generally, *Clark Cont.*, 325 *et seq.*; 1 *Page Cont.*, secs. 528-533; 9 *Cyc.*, 569; 15 *Am. & Eng. Encyc.*, 986; *Pollock Cont.*, 485.

In *Lloyd v. R. R.*, 151—536, the parties did not know that they were violating any law. For other cases illustrating the effect of intention, see *Michael v. Bacon*, 49 *Mo.*, 474, 8 *A. R.*, 138; *Graves v. Johnson*, 156 *Mass.*, 211, 32 *A. S. R.*, 446; *Brunswick v. Valteau*, 50 *Iowa*, 120, 32 *A. R.*, 119; *Anheuser Brewing Co. v. Mason*, 44 *Minn.*, 318, 46 *N. W.*, 558, 9 *L. R. A.*, 506; *Conithan v. Ins. Co.*, 91 *Miss.*, 386, 45 *So.*, 361, 18 *L. R. A. (N. S.)*, 214; *Phenix Ins. Co. v. Clay*, 101 *Ga.*, 331, 28 *S. E.*, 853, 65 *A. S. R.*, 307; *Pearce v. Brooks*, 6 *E. R. C.*, 334; 6 *R. C. L.*, 695.

3. A promise to pay money due on an illegal contract.

(173) CALVERT v. WILLIAMS,

64 *N. C.*, 168—1870.

Plaintiff sued on a note given partly for another note, and partly for board. The former note had been executed to one Christmas, for money won at cards, and it had been endorsed to plaintiff, for value and without notice, either then or when the second note was executed. There was a judgment for the defendant, and plaintiff appealed.

PEARSON, C. J. A note to secure the payment of money won at cards is void by statute, although the note be passed by endorsement, for valuable consideration, and without notice to the endorsee, it is void in his hands. So, if the maker executes a second note to the original payee, either in renewal of the first note simply, or including another debt, the second note is void; for it is to secure the payment of money won at cards, and the taint in the part of the consideration vitiates the whole—"a rotten egg." *Palmer v. Giles*, 58—75.

In our case the maker executed the second note to Calvert, who was the endorsee for valuable consideration, and without notice. This second note was given to secure the price paid by Calvert for the first note, and not to secure the payment of the money which Christmas had won; for the purpose of making, it must be referred to the proximate, and not the remote cause. The consideration, therefore, is not tainted by the illegality which vitiated the first note. His Honor erred in failing to note the distinction.

Cuthbert v. Hayly, 8 *Term*, 390, cited by Mr. Batchelor, establishes this distinction. The more recent case of *Hay v. Ayling*, 71 *E. C. L.*, 423, treats the point as settled, and is put on the

ground that the endorsee had notice, and that the second note was a mere device or contrivance to cover over the taint in the first note.

There is error. Judgment reversed, and judgment for plaintiff.

See Puckett v. Alexander, *ante*, (147); Steele v. Holt, 75—188; Weith v. Wilmington, 68—24; Warden v. Plummer, 49—524.

A gave a note in purchasing a judgment from B, which B had won at cards; the note is valid. Teague v. Perry, 64—39. If the note had been given for the gaming debt, and the judgment had been rendered thereon *in invitum*, it would have been valid. *Ibid.*; Jones v. Jones, 4—547; Dunn v. Holloway, 16—326.

A as principal and B as surety executed a note for money to be used for an illegal purpose; afterwards B paid the debt at A's request, and A gave his note to B for the amount; this note is valid. Powell v. Smith, 66—401. So a note given for money borrowed to pay an illegal debt. Kingsbury v. Suit, 66—601; Poindexter v. Davis, 67—112; but this was not applied to a contract by county authorities. Davis v. Comrs., 74—374. A lender may recover from a borrower money paid at his request in discharge of an illegal contract. Williams v. Carr, 80—294; 1 Page Cont., secs. 512-516; Clark Cont., 332; 15 Am. & Eng. Encyc., 995; 6 R. C. L., 698, 820, 821.

4. Relief of parties to the agreement.

1. LOCUS PENITENTIAE.

(174) WOOD v. WOOD, Extr.,

7 N. C., 172—1819.

There was a verdict and judgment for the plaintiff, and defendant appealed.

TAYLOR, C. J. This action was brought to recover the amount of a sum betted on a horse race, and deposited with defendant's testator as a stakeholder. The sum was paid over by him to the supposed winner of the race, after notice from the plaintiff not to do so; and the contract being illegal under the Act of 1810, the question is, ought the plaintiff to recover? Where money has been paid on an illegal transaction, in which both parties are equally criminal, it can not be recovered back; for there is no reason why he who parted with his money freely should have it again. *Volenti non fit injuria*; and the law in such case esteems the condition of the defendant the most eligible, not on account of any superior merit he has to the plaintiff, but because the latter can not build his claim on a moral foundation. This principle is distinctly recognized in many cases, and recently in Hauser v. Hancock, 8 Term, 575, and Edgar v. Fowler, 3 East, 222. And the first case also proves, that where money deposited on an illegal wager has been paid over to the winner by the consent of the loser, the latter can not afterwards maintain an action against the former, to recover back his deposit. But the law is different where the ac-

tion is brought against a stakeholder who has the money still in his possession, or has paid it over after notice not to do so. This distinction is taken in *Cotton v. Thurland*, 5 Term, 405, where the plaintiff was permitted to recover a stake deposited by him on the event of a boxing-match; and the latter case does not stand unsupported for its authority has been admitted and confirmed in a recent case of *Smith v. Bickmore*, 4 Taunt., 477; which was an action brought by a person who deposited in the hands of a stakeholder, a sum of money, as a wager on the event of a boxing-match, between himself and another; and he was allowed to recover the same from the stakeholder, having demanded it before it was paid over. In that case, Sir James *Mansfield* observes, "The law is got into sad confusion by contradictory decisions respecting illegal contracts. But this case seems made for the express purpose of confirming *Cotton v. Thurland*. In that case there was a doubt about the event, exactly as in this case; and the court thought the money might be recovered against the stakeholder. Now this is a case, not of an action against one of the parties to the wager, but against a stakeholder; therefore it is different from the cases of actions against underwriters to recover back premiums paid on illegal contracts." Whatever may be the illegality of the contract, the stakeholder is no party to it, and as long as the money remains in his hands he ought to be accountable to someone for it; there can be no justice in his claim for detaining it. The question between a party and a stakeholder is susceptible of views and considerations, which do not attach to it between the parties themselves. To both of the latter the law refuses its aid, on principles of public policy. It can not uphold the winner, for that were to enforce a void contract, and repeal an Act of Assembly. It will not assist the loser against him, because he has voluntarily parted with his money. And as both parties have violated the law, it will not trouble itself to alter the condition in which they have placed themselves. A stakeholder received the deposit to be paid over to the winner, and the authority given him is countermandable at any time before the payment is made. The money may be stopped *in transitu* to the person entitled to receive it. 3 East, 225. The court think the jury were properly instructed, and that the rule for a new trial should be discharged.

See also, *Forest v. Hart*, 7—458; *Bridgers v. McNeill*, 51—311; *Futrell v. Vann*, 30—402; 1 Page Cont., sec. 526, 539; *Clark Cont.*, 336; 15 Am. & Eng. Encyc., 1007; 6 R. C. L., 830; *Pollock Cont.*, 496, 502; *Bernard v. Taylor*, 23 Ore., 416, 18 L. R. A., 859, 37 A. S. R., 693; *Diggle v. Higgs*, 46 L. J. Ex., 721, 6 E. R. C., 482.

2. IN PARI DELICTO.

(175) POWELL & CO. v. INMAN,

53 N. C., 436, 82 A. D., 426—1862.

This was an action upon a bond for the payment of money. The defense was that the bond was given for an illegal consideration, in that it was to defraud creditors. There was a judgment for the defendant, and plaintiff appealed. Affirmed.

BATTLE, J. . . . In the argument submitted by the counsel for the plaintiff, he admits the correctness of the general principle, that a contract, the consideration of which is the doing of an act, either *malum in se* or *malum prohibitum* is void, and no action at law can be sustained upon it. He also admits that the fact of the contract's being under seal, does not preclude the illegality of the consideration from being inquired into, and urged as a defense. See Broom's Com., 91; Law. Lib., 280. But he contends that a bond for the payment of money, though made for the express purpose of defrauding the obligor's creditors, is valid as against him, by force of the Stat. Eliz., ch. 5, sec. 2; Rev. Code, ch. 50, sec. 1. By reference to that statute, it will be seen that bonds are mentioned along with several kinds of conveyances made with intent to delay, hinder and defraud creditors, however, as against those persons who are hindered, delayed, and defrauded of their debts; and it is inferred that bonds, as well as conveyances of property, are good and valid against those who execute them in favor of the obligee and grantee. This argument confounds the distinction between the nature and effect of a bond and an executed conveyance. The former is a chose in action, which may require the aid of a court, through the means of an action or suit, to give the obligee the benefit of it, while the latter transfers at once the title of the property granted or sold to the grantee or bargainee. Hence, to the former, the well established maxim of *ex dolo malo non oritur actio* may apply, while it is entirely inapplicable to the latter, which does not require the aid of a court to transfer the property. The fraudulent grantee or bargainee has, then, the advantage of his grantor or bargainor, because, having the property by force of the conveyance, the grantor or bargainor will be met, when he applies to be relieved against it, with the objection that "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." *Holman v. Johnson*, 1 Cowper, 343. The Statute of Frauds, 13 Eliz., —, in making void and of no effect conveyances intended to defraud creditors, as to the creditors only, and leaving them in full force in other respects

as between the parties, does not contravene that rule. But if the statute is to be construed as to its effect upon fraudulent bonds in the manner contended for by the plaintiff's counsel, it will violate the rule, and produce the strange and unnecessary anomaly, that while the obligee in a bond founded upon the illegal consideration of compounding a felony, gaming, usury, restraining trade, restraining marriage, and the like [may not enforce it], he may do so if the consideration were that of a most gross and outrageous attempt to cheat and defraud creditors. But the words of the statute may be satisfied without the necessity of adopting any such construction. A voluntary bond, executed without any actual intent to defraud creditors, may be avoided by them under the statute, if such an avoidance be necessary to secure their debts, but as between the parties the statute leaves it still in force. By giving to the statute such an operation and no more, the very salutary maxim to which we have referred, *ex dolo malo non oritur actio*, will be left in its full integrity, to prevent a recovery by the obligee of a bond conceived and executed by the parties with the actual intent to hinder, delay, and defraud the creditors of the obligor. That the distinction which we have endeavored to point out between bonds and executed conveyances does exist, is, as we think, established by adjudicated cases. That of *Roberts v. Roberts*, 2 Barn. & Ald., 366, 4 E. C. L. R., 545, cited by plaintiff's counsel, and all those referred to by Roberts in his work on *Fraudulent Conveyances*, which were held to be valid as between the parties, are cases of executed conveyances, while not a single instance of a bond made for that purpose of defrauding creditors has, to our knowledge, been upheld as good between the obligor and obligee.

Judgment affirmed.

(176) SYKES v. THOMPSON,

160 N. C., 348, 76 S. E., 252—1912.

The plaintiff was induced to pay to the defendant the sum of \$340, by representations of the defendant that plaintiff's sons had gotten that amount from him by fraud, and that they could not return home, or if they did they would be prosecuted. This amount was paid to prevent any trouble to plaintiff's sons. Later the plaintiff found the charges to be untrue, and brought his action to recover the money. There was a demurrer to the complaint, and the court sustained it on the ground that the plaintiff's action was based upon an illegal consideration. Plaintiff appealed.

Reversed.

HOKE, J. . . . In *Clark on Contracts*, p. 336, the author says: "It is a well-settled rule that in no case will the court lend its aid

to the enforcement of illegal agreements. Further than this, if the agreement has been executed, in whole or in part, by the payment of money or transfer of property, the court will not, as a rule, entertain an action to recover it back." This general principle has been applied in several recent decisions of the court, as in *Smathers v. Ins. Co.*, 151 N. C., 98; *Edwards v. Goldsboro*, 141 N. C., 60, and these and other cases here and elsewhere recognize that the rule as stated, or the second portion of it, is subject to well-recognized exceptions; one of them being when parties are not *in pari delicto*. In such case, if the facts otherwise justify it, recovery may be sustained by the more innocent party, notwithstanding the illegal features of the agreement, and this qualification of the more general principle is usually allowed to prevail when the "party seeking relief has been induced to enter into the agreement by fraud or undue influence." *Wright v. Cain*, 93 N. C., 296; *Pinkston v. Brown*, 56 N. C., 494; *Webb v. Fulchire*, 25 N. C., 485; *Hobbs v. Boatwright*, 195 Mo., 693; *Gorringer v. Reed*, 23 Utah, 120; *Austin v. Winston*, 11 Va., 33, 3 Am. Dec., 583; *Clark Cont.*, 336; 15 A. & E. Enc., 1000, 1007, etc.

The general doctrine, with the modifications applicable to the facts presented, is very well expressed in the headnotes to the Missouri case *supra*, as given in 113 Am. St. Rep., 709, as follows: "The doctrine that the courts will not aid a plaintiff who is *in pari materia* with the defendant is not a rule of universal application. It is based on the principle that to give plaintiff relief in such a case would contravene public morals and impair the good of society. Therefore the rule should not be applied in a case in which to withhold relief would to a greater extent offend public morals. The question of what is public policy in a given case is as broad as the question of what is fraud in a given case, and is addressed to the good common sense of the court. There may be such an inequality of condition between persons *in pari delicto* that relief may be given to the more innocent, if there are collateral and incidental circumstances attending the transaction and affecting the relations of the parties which render one of them comparatively free from fault, or where the courts intervene from motives of public policy." . . . We are of opinion that plaintiff's claim, on the facts as they now appear, comes well within the principle just stated, and that the judgment sustaining defendant's demurrer is erroneous.

(177) WEBB v. FULCHIRE,

25 N. C., 485, 40 A. D., 419—1843.

Action of *assumpsit* for \$40, lost in betting on which of three acorn cups a certain white ball was under. The court held that the plaintiff could not recover, and plaintiff appealed.

RUFFIN, C. J. It is not denied that the law gives no action to a party to an illegal contract, either to enforce it directly, or to recover back money paid on it after its execution. Nor is it doubted that money, fairly lost at play at a forbidden game and paid, can not be recovered back in an action for money had and received. But it is perfectly certain that money, won by cheating at any kind of game, whether allowed or forbidden, and paid by the loser without a knowledge of the fraud, may be recovered. A wager won by such undue means is not won in the view of the law, and, therefore, the money is paid without consideration and by mistake, and may be recovered back. That, we think, was plainly this case. The bet was, that the plaintiff could not tell which of the three cups covered the ball. Well, the case states that the defendant put the ball under a particular one of the cups, and, then, that the plaintiff selected that cup as the one under which the ball was. Thus we must understand the case, because it states as a fact that the defendant "placed the ball under one of the cups," and that the plaintiff "pointed to the cup," that is, the one under which he had seen the ball put, as being that which still covered it. We are not told how this matter was managed, nor do we pretend to know the secret. But it is indubitable that the ball was, by deceit, not put under the cup, as the defendant had made the plaintiff believe, and under which belief he had drawn him into the wager; or that, after it was so placed, it was privily and artfully removed either before or at the time the cup was raised. If the former be the truth of the case, there was a false practice and gross deception upon the very point, that induced the laying of the wager, namely, that the ball was actually put under the cup. For, clearly, the acts of the defendant amount to a representation, that such was the fact; and indeed the case states it as the fact. Hence, and because we can not suppose the vision of the plaintiff to have been so illuded, we rather presume the truth to be that the ball was actually placed where the defendant pretended to place it, that is to say, under the particular cup which the plaintiff designated as covering it. Then the case states that the defendant raised that cup, and the ball was not there; a physical impossibility unless it had been removed by some contrivance and sleight-of-hand by the defendant. Unquestionably it

was effected by some such means; for presently we find the defendant in possession of the ball, ready for a repetition of the bet, and the same artifice. Such a transaction can not for a moment be regarded as a wager, depending on a future and uncertain event; but it was only a pretended wager, to be determined by a contingency in show only, but in fact by a trick in jugglery by one of the parties, practiced upon the unknowing and unsuspecting simplicity and credulity of the other. Surely, the artless fool, who seems to have been alike bereft of his senses and his money, is not to be deemed a partaker in the same crime, *in pari delicto*, with the juggling knave, who gulled and fleeced him. The whole was a downright and undeniable cheat; and the plaintiff parted with his money under the mistaken belief that it had been fairly won from him, and, therefore, may recover it back.

The judgment of nonsuit is reversed, and judgment for the plaintiff according to the verdict.

See the various cases given above, especially *Ives v. Jones* (144); *Blythe v. Lovinggood* (145); *Melvin v. Easley* (149); *Ward v. Sugg* (150); *Garseed v. Sternberger* (153); *Basket v. Moss* (154); *Edwards v. Goldsboro* (156); *Smathers v. Ins. Co.*, 151—98; *Herring v. Lumber Co.*, 159—382; *Pfeifer v. Israel*, 161—409; *Robinson v. Life Ins. Co.*, 163—415.

Money won at gaming and paid, when the parties are equally guilty, can not be recovered. 1—49; 3—231; 3—297; 4—276; 13—303; 13—372; 16—326.

Negligence.—Defendant was held not liable for negligence in injuring the plaintiff, who was an officer and on the train on his way to join the Confederate army. *Turner v. R. R.*, 63—522; but one riding on a free pass, which it is unlawful for the railroad to issue, is not *in pari delicto*, and can recover for injuries resulting from negligence. *McNeill v. R. R.*, 135—682.

Fraud on creditors.—Where both parties enter into a contract to defraud creditors, the law will not help either of them. *York v. Merritt*, 77—213, 80—285. But in an agreement by which creditors are to be defrauded, the debtor may not be *in pari delicto*, by reason of circumstances attending the transaction. *Pinckston v. Brown*, 56—494.

Principal and agent.—The law will not allow an agent to retain as against his principal property which he has gotten in an illegal transaction. *Joyner v. Jewelry Co.*, 159—644; *Distilling Co. v. Bank*, 163—66; *Ware v. Spinney*, 76 Kan., 289, 91 Pac., 787, 13 L. R. A. (N. S.), 267; *Pollock Cont.*, 498.

In equity.—When the parties are *in pari delicto*, and one obtains an advantage over the other, equity will not grant relief; but otherwise where they are not equally in fault, as where one is ignorant of his right, or of the unlawful nature, or depends upon the other. *Wright v. Cain*, 93—296; *Harrell v. Wilson*, 108—97; *Sparks v. Sparks*, 94—527. Equity will not interfere to rescind an executed contract based upon illegal consideration, where the parties are *in pari delicto*, except where the contract is in violation of some statute to protect the citizen from oppression, and the party oppressed is asking relief. *Grimes v. Hoyt*, 55—p. 275; *York v. Merritt*, 80—285; *Lewis v. Latham*, 74—283; *McNeill v. R. R.*, 135—682. Neither will equity enforce such a contract as where plaintiff contracted to convey land to defendant, in consideration of his serving as a substitute for plaintiff's son, and defendant served, the contract was held to be void, and the plaintiff, having the legal title, could recover the land. *Lance v. Hunter*, 72—178; *McRae v. R. R.*, 58—395.

Where the parties are *in pari delicto*, the law will not help either one to get back what he has parted with in an executed contract; neither will it en-

force the contract, if executory; whether when the contract is executory and has been repudiated, either party can recover what he has parted with, does not seem clearly settled. In *Clemmons v. Hampton*, 64—204, it is said that he can recover, because it would be unjust to allow the other to keep the property; but see *Edwards v. Goldsboro*, 156; 15 L. R. A., 834; 15 Am. & Eng. Encyc., 1001; 1 Page Cont., secs. 518-525; 9 Cyc., 546; Clark Cont., 340; Pollock Cont., 503; *Collins v. Blantern*, 2 Wils., 34, 1 Smith L. C., 490; *Austin v. Davis*, 128 Ind., 472, 26 N. E., 890, 12 L. R. A., 121, note.

5. Rights of third persons.

(178) HENDERSON v. SHANNON,

12 N. C., 157—1827.

Action on a note under seal, which had been given for compounding a prosecution, and was endorsed to plaintiff before maturity, for value and without notice. There was a judgment for the defendant, and plaintiff appealed.

HALL, J. This is not a contest between the obligees and the obligors, as was the case in *Collins v. Blantern*, 2 Wils., 342. There the bond was given to stifle a prosecution for perjury, and both plaintiff and defendant were privy to the unlawful consideration, for which reason the bond was held to be void; nor is it the case of a bond declared to be void by statute on account of the illegality of the consideration on which it was given, as was the case of *Lowe v. Saller*, Doug., 736. There a bill of exchange given upon an usurious consideration was held to be void in the hands of an endorsee for a valuable consideration without notice of the usury. The present case is one where the bond is given upon a consideration which avoids it at common law, but assigned to plaintiff before it became due, and without notice of the consideration on which it was given. I had doubted whether the purpose to stifle a prosecution, for which the bond was given, was not of so criminal a nature as to make it void in the hands of an endorsee; but it is said by two judges, in *Aubert v. Maze*, 2 Bos. & Pull., 371, that there is no distinction between cases that are *malum prohibitum* and *malum in se*; and I am not aware that any adjudged case contradicts this position. Taking it then, that there is no such distinction, the case of *Steers v. Lassley*, 6 Term, 61, must be considered an authority for the plaintiff. There A was employed as a broker in stock-jobbing transactions for B, and paid money for him, for which he drew a bill on B, and endorsed it to C, after B had accepted it; but C had knowledge of the unlawful consideration on which it was drawn, and for that reason it was held by the court that he could not recover. From which I am to infer that had he been ignorant of the illegal consideration on which the bill was drawn, he would have been entitled to the judgment of the court in his favor. So in the case of *Brown v. Turner*, 7

Term, 626, where a bill drawn upon an illegal consideration, having been endorsed after it became due, was held liable in the hands of the endorsee to every defense which existed against it in the hands of the original payee. From which I infer that had it been endorsed before it became due, and without notice of the consideration on which it was drawn, as in the present case, the plaintiff would have been entitled to the judgment of the court. Therefore I think the law is in favor of the plaintiff, and that the rule for a new trial [should] be made absolute. New trial.

To the same effect is *Bascom v. Smith*, 66—537. A executed a negotiable note to B, on an illegal consideration, and B transferred it to C in due course; it was valid for C. The only exception is where the illegality is by statute which provides that the instrument shall be void, and this is the only difference between a consideration *malum in se* and *malum prohibitum*. *Weith v. Wilmington*, 68—24. So with a gaming debt, *Calvert v. Williams*, *supra* (173); and usury contract, *Shober v. Hauser*, 20—222; *Ward v. Sugg*, *supra* (150); *Glenn v. Bank*, 70—191. Where the illegality appears upon the face of the instrument, it is void in the hands of the third person. *Conly v. Hall*, 67—9; *Kellogg v. Howes*, 81 Cal., 170, 22 Pac., 509, 6 L. R. A., 588; *Jones v. Dannenberg*, 112 Ga., 426, 37 S. E., 729, 52 L. R. A., 271.

Fraudulent conveyances.—Innocent purchasers are protected in such contracts. *Revisal*, 965; *McCorkle v. Earnhardt*, 61—300; *McNeill v. Riddle*, 66—290.

Where the original debt is valid, and the note given for it is tainted with usury, the holder will be remitted to the right under the original. *Wilcoxon v. Logan*, 91—449; *Rountree v. Robinson*, 98—107; *Webb v. Bishop*, 101—99.

The illegality should be pleaded specially. 6—286; 64—642; 98—107.

6. Conflict of laws.

GOOCH v. FAUCETT,

Ante (151).

If the contract is valid in the state where it is made it is valid everywhere, with the general exceptions, that it will not be enforced, (1) if it contravenes the established policy of the forum; (2) if it would work injustice to the citizens of the forum; (3) if it violates the canons of morality. *Minor Conf. Laws*, 358. The law of the country where the contract is made (*lex loci*) is the rule by which its validity, its exposition and consequences are to be determined. *Watson v. Orr*, 14—161; *Anderson v. Doak*, 32—295; *Armstrong v. Best*, 112—59; *Miller v. R. R.*, 141—45; *Johnson v. Telegraph Co.*, 144—410. When the contract is in violation of the policy of the law of the forum, or only the remedy is affected, the *lex fori* controls. *Davis v. Coleman*, 29—424; *Taylor v. Sharp*, 108—377; *Hornthal v. Burwell*, 109—10; *Shields v. Ins. Co.*, 119—380; *Copeland v. Collins*, 122—619; *Cannady v. R. R.*, 143—439. See *Sunday Laws*, *supra*, 149. 9 Cyc, 575; *Clark Cont.*, 342; 22 Am. & Eng. Encyc., 1322, 1327 *et seq.*

Change of law does not make a void contract valid. *Puckett v. Alexander*, *supra*, 147; *Hughes v. Boone*, 102—137; *Spence v. Cotton Mill*, 115—210; *Jenkins v. Mfg. Co.*, 115—535.

Marriage.—By statute, *Revisal*, 2083, a marriage between a white person and a negro is void. *State v. Hairston*, 63—451; *State v. Reinhart*, 63—547; *Woodard v. Blue*, 103—109. Where the parties are domiciled in another State and the marriage is valid there, it will be recognized here. *State v. Ross*, 76—242; but where they are domiciled here and go into another State to evade the law, the marriage is void here. *State v. Kennedy*, 76—251; so with a polygamous marriage, *Williams v. Brawley*, 27—535.

II. Effect of Contract.

CHAPTER I.

EFFECT UPON PERSONS NOT PARTIES TO THE CONTRACT.

Sec. 1. Imposing obligations.

(179) OSBORN v. CUNNINGHAM,

20 N. C., 559—1839.

Assumpsit for money paid to the use of the defendant. The defendant and one Patton, as joint obligors, executed a note under seal for \$300; one-half of it had been paid; a writ was issued against the defendant and Patton for the balance; the plaintiff became bail for Patton, and a judgment was rendered against the defendant and Patton for the debt; Patton left the country, and the plaintiff was compelled by proper proceedings to pay the debt, amounting to \$162, and he brings this action to recover this amount from the defendant. There was a judgment for the defendant, and plaintiff appealed.

DANIEL, J. The plaintiff declared in *assumpsit* for money paid to the use of the defendant, at his request, and the inquiry is, whether the law would in a case like this, imply a request. It is settled law that if one pays the debt of another without his request, express or implied, he can not recover in an action for money paid; for the supposed debtor may have good reason to resist the payment of the money. *Stokes v. Lewis*, 1 T. R., 20; 2 Saund., 264; *Leigh's N. P.*, 70. The plaintiff became bail only for Patton, at his request, and for his personal benefit. In consequence whereof, he has been by process of law compelled to pay the whole debt, for which the creditor had recovered a joint judgment against Patton and the defendant on their joint obligation. Had Patton, merely from his relation of co-obligor, any agency or authority to request the plaintiff to pay the joint debt, so as to subject the defendant to this action for money paid to his use? We can find no authority for such a position. The law will certainly imply a request to pay on behalf of Patton, who was the principal in the bail bond; but not on behalf of the defendant, who was not a privy, but is a mere stranger to that transaction. It seems to

us that the opinion of the judge was correct, and therefore the judgment must be affirmed.

A third person officiously paying the debt of another, without his request, express or implied, can not recover the amount paid, unless the debtor ratifies it. In some cases it is held that for the debtor to take advantage of the payment is not sufficient ratification; while other cases hold that this is sufficient, and if the debtor does not ratify, the debt remains unpaid as to him, and may be enforced by the other as an equitable assignee. 22 Am. & Eng. Encyc., 535-538.

See *Hanner v. Douglas*, 57—262. In *Carter v. Black*, 29—561, it was held that a voluntary endorser could not recover at law against the maker of a note, if compelled to pay it; but he might recover in equity, as equitable assignee or by subrogation. *Carter v. Jones*, 40—196. Where one becomes bail for one partner and has the debt to pay, he can not recover from the other partner. *Foley v. Robards*, 25—177; unless the liability is assumed for the firm. *Springs v. McCoy*, 120—417; so bail for one of two judgment debtors is not a surety for the other. *Jackson v. Hampton*, 32—579. An agent for collection who officiously pays the debt can not recover, unless it were an equitable assignment. *Null v. Moore*, 32—324. This rule grows out of the principle that consent is necessary to a contract, and a man has a right to know with whom he is dealing. *Clark Cont.*, 349; 2 *Page Cont.*, sec. 832; 22 Am. & Eng. Encyc., 537; 9 *Cyc.*, 702; 23 *L. R. A.*, 120, and note. *Kenan v. Holloway*, 16 *Ala.*, 53, 50 *A. D.*, 162; *Neely v. Jones*, 16 *W. Va.*, 625, 37 *A. R.*, 794; *Crumlish v. Cent. Imp. Co.*, 38 *W. Va.*, 390, 45 *A. S. R.*, 872, 23 *L. R. A.*, 123; 27 *Cyc.*, 838.

Executors and administrators.—The employment of counsel by an executor does not create a debt against the estate, but it is a personal obligation, and he may be allowed for such expenses on settlement. *Devane v. Royal*, 52—426; *Kesler v. Hall*, 64—60; *Lindsay v. Darden*, 124—309; *Kelly v. Odum*, 139—278. So for money had and received or other liability arising after the death of the testator. *Hailey v. Wheeler*, 49—159; *Beaty v. Gingles*, 53—302; *Hall v. Craige*, 65—51; *Kerchner v. McRae*, 80—219; *Tyson v. Walston*, 83—90; *Bank v. Morehead*, 116—412. Funeral expenses, 2 *Page Cont.*, sec. 833; see *Implied Contracts, ante*.

Subcontractor.—The owner of property may, under the statute (*Revisal*, 2019,) be liable to subcontractor. *Wood v. R. R.*, 131—48; *Lumber Co. v. Hotel Co.*, 109—658; *Hardware Co. v. Graded Schools*, 151—507.

Sec. 2. Interference with contract relations.

(180) JONES v. STANLY,

76 N. C., 355—1877.

Action for damages, in which the plaintiff appealed.

RODMAN, J. It was decided in *Haskins v. Royster*, 70 N. C., 601, that if a person maliciously entices laborers or croppers to break their contracts with their employer and desert his services, the employer may recover damage against such person. The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service. In the present case the plaintiff made a contract with the Atlantic & North Carolina Railroad Company, of which the defendant was president and superintendent, by which the company agreed to transport from points on their

road to Morehead City a large number of cross-ties which plaintiff had contracted to deliver in Cuba. After the contract had been partly performed the defendant, being still president and superintendent of the company, maliciously and for the purpose of injuring the plaintiff, as the jury have found, refused to complete the contract, whereby the plaintiff was injured. After the jury had found a verdict for the plaintiff and assessed his damages the judge arrested the judgment, and the plaintiff appealed. In this we think the judge erred and his judgment must be reversed.

It is the duty of this court to give such judgment as it appears in the record that the court below should have given. The plaintiff moves here for judgment upon the verdict. There are no exceptions by defendant to the judge's charge, and it does not appear that he asked for a new trial. The instructions of the judge on the question of damages are not full, but it does not appear that he was requested to give any others. If he had thought the damages excessive, he would have set the verdict aside and given a new trial on that ground. We neither do nor can know anything of the evidence, and if we did we could not set aside the verdict and give a new trial on that ground, except perhaps where it appeared to be a very gross case of excess.

Judgment below reversed and a judgment in this court for the plaintiff according to the verdict.

(181) SWAIN v. JOHNSON,

151 N. C., 93, 65 S. E., 619—1909.

BROWN, J. We deem it unnecessary to discuss the seventy exceptions set out in the record, as in our opinion the whole case may be reviewed in passing upon the correctness of His Honor's ruling in granting the motion to nonsuit.

The plaintiff contends that he contracted with the defendant Noble to purchase all the pine and juniper timber on certain lands belonging to the Cox heirs, said Noble being their attorney in fact, with power to sell the land; that the defendants West and Johnson conspired together and induced Noble to violate his contract with plaintiff by purchasing the lands from Noble for a corporation, the West Lumber Co., in which West and Johnson were interested. Wherefore, for such alleged tort, the plaintiff claims substantial damages.

The principle of law upon which plaintiff founds his right of action is thus stated in Comyn's Digest, Action on Case A: "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing such loss to another, without

justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong."

This principle has been applied in some jurisdictions to the violation of contracts for personal service, and was so applied in this court in *Haskins v. Royster*, 70 N. C., 601, although by a divided court. It has been applied to the malicious enticing away of workmen; to the loss of a contract of marriage by means of a false and malicious letter; to maliciously enticing and inducing a wife to remain away from her husband, and to maliciously inducing an opera singer to abandon her contract; but we find no case in any court where it has ever been applied to breaches of contracts to convey title to property. It is true that in *Jones v. Stanley*, 76 N. C., 356, it was applied where the president of a railroad company maliciously prevented his company from performing a contract of carriage of freight, and in that case Judge Rodman says "the same reasons cover every case where one maliciously persuades another to break any contract with a third person." This is but a *dictum*, and in commenting on it the Supreme Court of Kentucky, in a well-considered opinion in *Chambers v. Baldwin*, 11 L. R. A., 547, says: "We have seen no other case where the doctrine is stated so broadly." This Kentucky authority, with the voluminous notes of the annotator and the numerous cases cited, support fully the text of Judge Cooley, that "an action can not, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequences, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." Cooley on Torts, 497. To this rule there are but two generally recognized exceptions—one where servants and apprentices are induced from malicious motives to leave their master before the term of service expires, and the other arises where a person has been procured, *against his will* or contrary to his purpose, by coercion or deception of another, to break his contract. *Green v. Button*, 2 Crompt. M. & R., 707; *Ashley v. Dixon*, 48 N. Y., 430. This is based upon the idea that a person has no right to be protected against competition, but he has a right to be free from malicious and wanton interference in his private affairs.

If the disturbance or loss comes as the result of competition or the exercise of like rights by others, it is *damnum absque injuria*. *Walker v. Cronin*, 107 Mass., 564. It is only where the contract would have been fulfilled but for the false and fraudulent representations of a third person that the action will lie against such third person. *Benton v. Pratt*, 2 Wend., 385, citing *Pasley v. Freeman*, 3 T. R., 51. The case of *Ashley v. Dixon*, *supra*, is in every respect similar to the one under consideration. In that case

the New York court holds: "If A has agreed to sell property to B, C may at any time before the title has passed induce A to sell it to him instead; and if not guilty of fraud or misrepresentation, he does not incur liability, and this is so, although C may have contracted to purchase the property of B. B can not maintain an action upon the latter contract, as he can not perform and can only look to A for a breach of the former." This doctrine is supported by abundant authority. Cooley on Torts, *supra*; Otis v. Raymond, 3 Conn., 413; Young v. Scovell, 8 J. R., 25 N. Y.; Johnson v. Hitchcock, 15 J. R., 185; Gallagher v. Brunell, 6 Cow., 347; Hutchins v. Hutchins, 7 Hill, 104.

Tested by these generally accepted principles, the plaintiff has entirely failed, for he does not allege, and there is not a shred of evidence to prove, that Noble was ready and willing to perform his alleged contract with the plaintiff, but that he was prevented, against his will, from so doing by the false and fraudulent representations of West and Johnson, or either of them. . . .

Affirmed.

"If one contracts to render personal services for another, any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party for damages. It extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons. Haskins v. Royster, 70—601, citing Walker v. Cronin, 107 Mass., 555. "Without lawful justification" is sufficient to constitute malice. Holder v. Mfg. Co., 135—392. Furnishing a servant the means to leave the premises would not of itself be sufficient evidence of enticing. Morgan v. Smith, 77—37; Revisal, 3365, 3374. Violation of the statute is indictable, State v. Rice, 76—194; State v. Daniel, 89—553; even though the servant was a minor, State v. Harwood, 104—724; but not where the minor leaves under the command of the father, State v. Anderson, 104—771. The statute does not apply where the servant has not entered upon the service, but the third person would be liable for damages for inducing the servant to break his contract. Sears v. Whitaker, 136—37; Biggers v. Matthews, 147—299; Smith v. Ice Co., 159—151.

Some courts have held that this does not apply except in case of master and servant. Clark Cont., 349. But it has become an important subject, owing to the many ways in which contracts may be interfered with, as in conspiracies, unions, strikes, boycotts, blacklisting, etc. See 3 Page Cont., sec. 1323 *et seq.*; 16 Am. & Eng. Encyc., 1109 *et seq.*; 1 Cyc., 662 *et seq.*; 26 Cyc., 1580; 11 L. R. A., 545, 550; 12 L. R. A., 193; 19 L. R. A., 408; 20 L. R. A., 342; 21 L. R. A., 233; 25 L. R. A., 414; 28 L. R. A., 464; 43 L. R. A., 797; 62 L. R. A., 673; Lumley v. Gye, 2 E. & B., 216, 1 E. R. C., 707; Allen v. Flood, 1898, A. C., 1, 17 E. R. C., 284; Pollock Cont., 224; Mord. & McRem., 582.

Enticing away apprentice, Revisal, 193; McKay v. Bryson, 27—216; Moore v. Love, 48—215; Stout v. Woody, 63—37.

Fraudulent removal of debtor, Revisal, 1939; Godsey v. Bason, 30—260; March v. Wilson, 44—143; Wiley v. McRee, 47—349; Moore v. Rogers, 48—90, 51—297.

Landlord and tenant.—Revisal, 3366, 3367.

Sec. 3. Conferring rights upon third persons.

1. Right to sue upon a contract to which he is not a party.

(182) SAVAGE to the use of BARRETT v. CARTER,

64 N. C., 196—1870.

Action of debt, in which there was a judgment of nonsuit, and plaintiff appealed.

RODMAN, J. This was an action of debt, brought before the adoption of the Code of Civil Procedure by which the law in respect to parties is materially altered. We are therefore to decide the question presented on the law as it stood when the action was brought. By its express provisions The Code does not apply to such actions, until after judgment. The bond sued on was payable to "Mills E. G. Barrett, agent of Wm. R. Savage," for the hire of certain slaves. It is a deed poll; it does not appear, except inferentially, to whom the slaves belonged. Therefore *Whitehead v. Riddick*, 34 N. C., 95, which was a deed *inter partes*, is not applicable. It is said in 1 Chit. Pl., 3, "If a bond be given to A, conditioned for the payment of money to him for the use or benefit of B, or conditioned to pay the money to B, the action must be brought in the name of A, and B can not sue for or release the demand." The reasons for this doctrine are previously stated. Conformable to it are several decisions in this court. In *Grist v. Backhouse*, 20 N. C., 496, the note was payable to "Richard G. Grist, agent of his assignee;" in *Dowd v. Wadsworth*, 13 N. C., 130, it was payable to A, guardian of B; in *Waddell v. Moore*, 24 N. C., 261, it was payable to A, executor of B. In the two first of these cases it was held that the legal payee was the only proper plaintiff, and in the last, that the executor need not describe himself as executor, and such description was surplusage. We think ourselves bound by these authorities, especially by *Grist v. Backhouse*, as being most closely in point, in the present case.

The judgment below must be

Affirmed.

See also *Winslow v. Fenner*, 61—565; 6 R. C. L., 881.

DRAUGHAN v. BUNTING,

Ante (51).

Where money or property is placed in the hands of a person for the benefit of a third, the latter may sue. *Stanley v. Hendricks*, 35—86; *Threadgill v. McLendon*, 76—24; *Mason v. Wilson*, 84—51; *Voorhees v. Porter*, 134, p. 604.

(183) PEACOCK v. WILLIAMS,

98 N. C., 324, 4 S. E., 550—1887.

Civil action to recover amount due for lumber. Plaintiff furnished lumber to one Mrs. Luke to build a house; Mrs. Luke made an agreement with the defendant, as a member of the firm of Williams & Buchanan, by which she executed to them a note and mortgage for \$800, on condition that they should receipt and deliver all bills and accounts due them by Mrs. Luke, and pay over the balance to her, and surrender to her the house built for her "free from all liens and encumbrances whatever." The plaintiff claimed that the defendant should pay his claim by reason of the above agreement. There was a verdict and judgment for the plaintiff, and the defendant appealed.

SMITH, C. J. It will be seen from the fourth allegation of the complaint and its plain and distinct reference to this agreement, and from its introduction in support of the demand that the plaintiff's right of action rests entirely upon the undertaking on the part of Williams & Buchanan to surrender the house to the owner of the lot, "free from all liens and encumbrances whatever." It is also apparent that the fund provided for this purpose is the note executed by the owner of the lot and secured in the manner specified in the contract. This security must be understood, as meant in the charge, that if "they (the jurors) found that he (the defendant) had such funds, sufficient in amount, and had contracted with her (Mary F. Luke) to pay it, then they would, in answer to the issue, say how much was due the plaintiff from the defendant."

In our opinion the point is well taken that the defendant incurred, under his agreement and from his possession of the note, no personal liability which the plaintiff can enforce in this form of action *ex contractu*. The agreement is in substance one for the indemnity of the owner of the property against its being subjected to the asserted lien, and is solely between the parties to it, with whom the plaintiff is not in privity.

In *Morehead v. Wriston*, 73 N. C., 398, an incoming partner agreed with the others that the new firm should assume and become liable for the debts due by the old firm, and this upon a sufficient consideration; and it was held that a creditor of the old firm could not sue on the contract. *Reade, J.*, remarking, "that the agreement must be between the new partner and the creditor, and upon a consideration moving from the creditor." See also *Parker v. Shuford*, 76 N. C., 219.

The case does not come within that class wherein when money or an article of agreed money's worth, as money, is deposited with

one person to be paid to another, and the action is permitted for a recovery as of money received for his use under an implied contract to pay according to numerous rulings. *Draughan v. Bunting*, 31 N. C., 10; *Carroway v. Cox*, 44 N. C., 173.

Yet there are qualifications of the principle, even in case of such reception of money. Thus when an agent received money from his principal with instructions to pay it to a certain creditor, and the agent made a different disposition of it, and no demand was made by such creditor until after the agent had accounted with his principal, it was decided that the creditor could not look to the agent for such money. *Dixon v. Pace*, 63 N. C., 603.

So again in *Strayhorn v. Webb*, 47 N. C., 199, it is ruled that until the creditor for whose use the deposit is made does some act, whereby he ratifies the receiving "so as to extinguish the debt and make the money his own," he can not maintain an action against the party receiving. *White v. Hunt*, 64 N. C., 496.

Here there is no promise to pay the plaintiff, and the defendant has no funds with which to make the payment, but only a note secured from the party by which they might be derived, and the undertaking is to exonerate the property from liens and encumbrances, and it can be enforced, as it can be released by the party with whom the contract is made, and her liability for the materials furnished, not personal, but by reason of the lien, remains as before unaffected by the provision made for relieving the premises therefrom.

The plaintiff vindicates his claim to follow the fund and cites numerous cases in its support decided in the courts of equity. But this is not the case presented in the complaint, which is one that under our former practice would have been an action at law, and depends not upon an equity, but upon contract. An immediate judgment is demanded, and this because the defendant holds a personal security of the owner of the lot and may have realized nothing under it wherewith to make the payment. In no point of view can the plaintiff maintain his action, and there is error in refusing to dismiss it.

The judgment must, therefore, be reversed.

Error.

Reversed.

A rented a house, and afterwards associated B and C with him in business, and the firm occupied the house; the owner could not hold B and C for the rent. *Pierce v. Alspaugh*, 83—258. A promise to pay a debt barred by the statute of limitations must be made to the creditor, and not to a third person. *Parker v. Shuford*, 76—219; *Kirby v. Mills*, 78—124. A promise made by the wife to the creditor in the presence of her husband to pay the debt of her husband, out of her own property, and by reason of which he forbore to enforce the debt against the husband, is not valid as a married woman's contract; and if made to the husband, the creditor could not enforce it because not a party to it. *Coffey v. Shuler*, 112—622.

(184) WOODCOCK v. BOSTIC,

118 N. C., 822, 24 S. E., 362—1896.

Civil action on contract. The defendant demurred to the complaint; the demurrer was overruled, and defendant appealed.

MONTGOMERY, J. On the 2d of August, 1890, J. B. Bostic conveyed to D. D. Suttle a tract of land for the price of \$5,500, Suttle at the same time executing his bond for the purchase-money and securing the same by a deed of trust on the land. Bostic assigned the bond to the plaintiff, Julia E. Woodcock, for value. Afterwards the defendant Ray became the purchaser of the land from Suttle or his grantee, and entered into a written agreement with Bostic and Suttle in which he, after reciting the indebtedness of Bostic and Suttle to the plaintiff, and declaring that it was secured by a deed of trust upon the land which he had bought subject to the same, assumed and agreed with Bostic and Suttle to pay the aforesaid debt of Julia E. Woodcock, and also to protect and save Bostic and Suttle from any and all liability by reason of or from the same. Bostic and Suttle assigned and transferred this assumption and guaranty to the plaintiff.

This action was commenced by the plaintiff against the defendant upon his assumption and guaranty. It is in form an action *ex contractu*. The bond of Suttle to Bostic, which Bostic assigned to the plaintiff, is only mentioned in the complaint as a recital to explain what was the exact amount of defendant's assumption and that the debt was still due. The trustee named in the deed which secured the bond is not party to the action, nor is there any prayer for the foreclosure of the trust, and for a personal judgment against the defendant Ray, for any deficiency. Neither is there any equitable subrogation invoked, by which the assumption of the defendant might be subjected to the satisfaction of the bond. This action is under the old form of *assumpsit*, and is against the defendant on his promise made to Bostic and Suttle under their assignment of the same to the plaintiff. The plaintiff insists that she can recover both on the assignment of Bostic and Suttle to her of the defendant's assumption and on the broad ground that the defendant is liable to her directly, even if the assignment of the assumption of the defendant had not been made to her by Bostic and Suttle, because of the promise made by the defendant to Bostic and Suttle to pay her debt. We will discuss the last proposition first.

The proposition is that, at law, a third person may maintain an action upon the promise of one person to another for the advantage and benefit of the third. There is conflict of judicial opinion

on the question. The affirmative is held in many of the States, including New York, *Burr v. Beers*, 24 N. Y., 178. In others of the States, including North Carolina, the contrary is held. *Peacock v. Williams*, 98 N. C., 324; *Morehead v. Wriston*, 73 N. C., 398. But the plaintiff insists further that Suttle ought to be considered a mortgagor and the defendant Ray a vendee who has purchased and agreed to pay the mortgage debt to Bostic, the latter to be considered a mortgagee; and that between them Bostic has become the surety, and Ray the principal debtor, and that the plaintiff stands in the shoes of Bostic by virtue of his assignment of his bond to her, and that therefore she ought to be subrogated to the rights of Bostic, and have the assumption of Ray subjected to the payment of the plaintiff's debt. This is a sound principle of equity. In New Jersey and Massachusetts it has been held that the liability of the grantee of a mortgagor who has promised and assumed to pay the mortgage debt can be enforced in equity by the mortgagee or his assignee by the application of the principle of equitable subrogation. *Hayden v. Snow*, 15 Fed. Rep., 70. In the case of *Keller v. Ashford*, 133 U. S., 610, the same principle is declared, and Mr. Justice *Gray*, who delivered the opinion, quoted with approval from *Cromwell v. St. Barnabas Hospital* (N. J. Court of Errors), as follows: "The right of a mortgagee to enforce payment of the mortgage debt, either in whole or in part, against the grantee of the mortgagor does not rest upon any contract of the grantee with him or with the mortgagor for his benefit." The purchaser of land subject to mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his vendor, the principal debtor, and the liability of the vendor as between the parties is that of surety. In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the relation of a surety for others holds for his indemnity. It is in the application of this principle that decrees for deficiency in foreclosure suits have been made against subsequent purchasers who have assumed the payment of the mortgage debt, and thereby become principal debtors as between themselves and their grantors. But the plaintiff here has not brought her action in this form and with this end in view. Her action is not for equitable subrogation to get the benefit of a security held by her debtor, Bostic. She alleges in her complaint that she owns the assumption and promise made by Ray to Bostic and Suttle, and seeks to enforce it against Ray in her own right at law, without any prayer for equitable relief or stating any element of equity in her complaint.

She can not, therefore, have equitable relief, because she has prayed for none.

We will now take up and discuss the proposition of the plaintiff that she can recover upon the assignment of the assumption and guaranty of the defendant, made to Bostic and Suttle, and by them transferred to her. The question for decision then is, is the assumption and guaranty assignable? If it is, then the plaintiff can maintain her action; if it is not, she must fail. Section 55, C. C. P., which is section 177 of The Code, with a slight alteration, was almost a literal transcript of sections 111 and 112 of the New York Code when our Code of Civil Procedure was adopted. Those sections of the New York Code produced so much litigation and involved the courts in so great perplexities in their attempts to arrive at some uniformity of decision in construing them, that the legislature of that State, to declare with some degree of certainty what things might be the subject of assignment, repealed them and enacted in their place (now section 1910 of the New York Code) the following provision: "Any claim or demand can be transferred except in one of the following cases: 1. When it is to recover damages for personal injury or for a breach of promise to marry. 2. When it is founded on a grant which is made void by a statute of the State, or upon a claim to or interest in real property, a grant of which by the transfer would be void by such a statute. 3. Where a transfer thereof is expressly prohibited by a statute of the State, or of the United States, or would contravene public policy." In New York it might be that under their statute an agreement and assumption like the one sued on in this action would be the subject of assignment. But in North Carolina we have no such statute. Section 177 of The Code contains the law by which we are to be governed in arriving at a conclusion. We have no decisions of this court upon that section of The Code bearing directly on this particular point raised in this case, nor any general rule of construction of this statute by which we might be aided in our investigations. In *Petty v. Rousseau*, 94 N. C., 355, it would seem that something like a general rule had been laid down, but *Ashc*, J., who wrote the opinion in that case, was inadvertent to the change which had been made in the New York Code by the repeal of sections 111 and 112 thereof, and the adoption of section 1910, which we have quoted in full above, in their place, and quotes section 1910 in full as being the annotations of Mr. Bliss upon sections 111 and 112. He quoted by mistake the amended law of New York, instead of, as he supposed, the construction which Mr. Bliss put upon sections 111 and 112, which had been repealed. So, the opinion in that case does not aid us, for it was really based on the then statutory law of New York. Upon a merely cursory examination into the matter it will appear that many inconsistencies and incongruities must attend the assign-

ment of an agreement like the one before us. If an assignee can make no possible use of the thing assigned to him, the assignment is a vain thing. If the courts could not and would not entertain a suit at the hands of an assignee, because of the uselessness to him in any event of the thing transferred, how can it be said that such a thing is assignable? The law could not say that a matter, even though based on contract, could be assigned if it could not possibly be of use to the assignee. The law means, when it says that a thing is assignable, that the assignment carries with it rights of property, and that those rights can be enforced in the courts. It would seem to be clear, too, that a thing, to be assignable, must be the subject of assignment generally—to every one—and not be confined in its application to particular persons. It can not be that the same subject-matter of assignment can be assigned to one person and not to another person. It is difficult to understand how the subject of assignment can be limited in its transference to particular persons—good if assigned to some persons, and of no avail if assigned to others. Now what use could a stranger make of the agreement sued on in this case, if it had been assigned to him instead of to the plaintiff? Suppose a stranger was the owner by assignment of this agreement and had brought suit upon it, what would his complaint be, and what kind of judgment would he pray for? The complaint would have to state that the defendant had promised to pay a note due, not to himself, but to Mrs. W., and that he was the owner by assignment from Bostic and Suttle of the defendant's promise to do so. He could not demand judgment that the money be paid to him, because his complaint stated that it was due to Mrs. W. He could not ask that the money be paid to Mrs. W., for he could not prosecute an action in her name, nor have any judgment pronounced for or against her in a suit where she was not a party. In truth, the court could give no judgment. So, looking at the matter in all its bearings, we are constrained to say that the assumption and promise sued on in this action is entirely personal to Bostic and Suttle, with whom it was made, and is not assignable, although it would pass to the personal representative of Bostic in case of his death, and that the plaintiff can not maintain this action upon it. His Honor erred in overruling the demurrer of the defendant.

Error.

In *Woodcock v. Merrimon*, 122—731, the plaintiff asked for a sale of the land by the trustee in the deed of trust executed by Suttles; and in *Woodcock v. Bostic*, 128—243, the equitable remedy referred to in the above opinion was resorted to.

"The prevailing rule in the United States is that where a grantee of mortgaged premises has agreed with the vendor to assume the mortgage, the mortgagee may recover against him, either in law or in equity. Such recovery is allowed generally on one of two principles: namely, upon the theory of equitable subrogation, or upon the theory that, the promises having been

made for his benefit, the mortgagee may sue upon it." 20 Am. & Eng. Encyc., 992. Both doctrines are discussed and numerous cases cited on pages 993—1000; 27 Cyc., 1749. That the mortgagee may sue him personally, see 6 L. R. A., 610, and notes; 7 L. R. A., 33; 29 L. R. A., 851; 37 L. R. A., 862; but not unless transfer was assented to by mortgagee. *Keller v. Ashford*, 133 U. S., 610. Our court seems to have adopted the subrogation theory, except where there is an understanding with the mortgagee. *Baber v. Hanie*, 163—588; as to indemnity contracts, see *Clark v. Bonsall*, 157—270, 48 L. R. A. (N. S.), 191; *Supply Co. v. Lumber Co.*, 160—428, 42 L. R. A. (N. S.), 707; 6 R. C. L., 890.

(185) GORRELL v. WATER SUPPLY CO.,

124 N. C., 328, 32 S. E., 720, 46 L. R. A., 513, 70 A. S. R., 598—1899.

Civil action for damages caused by fire through negligent failure of defendant to furnish sufficient pressure. The defendant had made a contract with the city of Greensboro to furnish the city "with pure and wholesome water for the use of its citizens and of force at all times sufficient to protect the inhabitants of the city against loss by fire." The plaintiff was a citizen of said city and paid taxes with other citizens for this water supply, and her property was destroyed by fire on account of defendant's failure to comply with its contract. There was a demurrer to the complaint, which was overruled, and defendant appealed.

CLARK, J. (after stating the allegations of the complaint). The demurrer as far as it relates to the merits of the case is substantially that the complaint has stated no cause of action:

(1) Because the plaintiff, though a citizen and taxpayer of Greensboro (as alleged in the complaint), is neither a party nor privy to the contract, the breach of which is the foundation of the action.

(2) The failure of the defendant to furnish water was not the proximate cause of the plaintiff's loss.

It is true the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease and security from fire of the people, the citizens of Greensboro. This is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and taken alone, would never have justified the grants, concessions, privileges, benefits and payments made to the water company. Upon the face of the contract, the principal beneficiaries of the contract in contemplation of both parties thereto were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the indi-

vidual citizens with adequate supply of water and the protection of their property from fire was the largest duty assumed by the company. One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. This has been sustained by many decisions elsewhere. *Tillis v. Harrison*, 104 Mo., 270; *Lawrence v. Fox*, 20 N. Y., 268; *Simpson v. Brown*, 68 N. Y., 355; *Vrooman v. Turner*, 69 N. Y., 280; *Wright v. Terry*, 23 Fla., 160; *Austin v. Seligman*, 18 Fed. Rep., 519; *Burton v. Larkin*, 36 Kans., 246; and even when the beneficiary is only one of a class of persons, if the class is sufficiently designated. *Johannes v. Insurance Companies*, 66 Wis., 50. It was considered though without decision by this court in *Haun v. Burrell*, 119 N. C., 544, 548, and *Sams v. Price*, *Ibid.*, 572. Especially is this so when the beneficiaries are the citizens of a municipality whose votes authorized the contract and whose taxes discharge the financial burdens the contract entails. The officials who execute the contract are technically the agents of the corporation, but the corporation itself is the agent of the people, who are thus effectively the principals of the contract. The acceptance of the contract by the water company carries with it the duty of supplying all persons along its mains. *Griffin v. Water Co.*, 122 N. C., 206; *Hangen v. Water Co.*, 14 L. R. A., 424.

In *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky., 340 (1889), it is held: "If a water company enter into a contract with a municipal corporation whereby the former agrees, in consideration of the grant of a franchise and a promise to pay certain specified prices for the use of hydrants to construct waterworks of a specified character, force and capacity, and to keep a supply of water required for domestic, manufacturing and fire protection purposes for all the inhabitants and property of the city, a taxpayer of the city may recover of the water company when, through a breach of its contract, he is left without means of extinguishing fire and his property is on that account destroyed," and it is therein further held: "Where a party undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, damages sustained by the destruction of buildings by the failure to so furnish such water is a natural and proximate consequence of such breach of the undertaking." This opinion is based upon sound reason and is adopted by us. It is conclusive of both points raised as to the merits of the controversy by the demurrer. Indeed, it could not be doubted that if the city buildings were destroyed by fire through failure of the defendant to furnish water for their protection as provided by the contract, the city could recover. *New Orleans v. Waterworks*, 72 Fed. Rep., 227. Besides, the complaint, in para-

graphs 13 and 14, alleges that the defendant's failure to furnish water as per contract was the direct and sole cause of the loss, and this is admitted by the demurrer. Thus, the question really narrows down to the question whether the beneficiaries of a contract, who furnish the consideration money of the contract, can maintain an action for damages caused by its breach.

The case of Paducah v. Water Co. is exactly in point, was reaffirmed on a hearing, and is followed by Duncan v. Water Co., in the same volume, making three decisions all together. The decisions, however (twelve in number), in other States where the question has been presented, are the other way. But this is a case of the first impression in this State, and decisions in other States have only persuasive authority. They have only the consideration to which the reasoning therein is entitled. They are to be weighed, not counted. We should adopt that line which is most consonant with justice and the "reason of the thing."

Did the people of Greensboro have just cause to believe that by virtue of that contract, they as well as the corporation were guaranteed a sufficient quantity of water to protect their property from fire, and did the water company understand it was agreeing, for the valuable considerations named, to furnish a sufficient quantity of water to protect private as well as public property from fire? The intent is to be drawn from the instrument itself, and on its face there can be no doubt it was contracted that the water supply should be sufficient to protect private as well as public property. If so, it follows that when by breach of that contract private property is destroyed, the owner thereof, one of the beneficiaries contemplated by the contract, is the party in interest, and he and he alone can maintain an action for his loss.

As said by Judge *Freeman*, the learned annotator of the American State Reports, in commenting on the fact (29 Am. St. Rep., at page 863), that the majority of decisions so far rendered were adverse to the position taken in the Kentucky case above cited and approved by us: "As none of the courts have fairly faced what seems to be the logical results of these decisions, viz., that the injured person is left without any remedy at all, it must be admitted that the subject is left in an extremely unsatisfactory position. It seems to be universally agreed, and on the soundest reasoning, that the city itself is not liable for failing to protect the property of taxpayers from fire, unless made liable by express statutory provisions. *Wright v. Augusta*, 78 Ga., 241 (6 Am. St. Rep., 256). And it seems equally clear that the city would have no right of action in such case in behalf of the taxpayer, for the basis of all the [adverse] decisions is that there is no privity of contract between the taxpayer and the water companies. If the contract is

not made for the benefit of the taxpayers in such a sense that they can sue upon it, it can hardly be maintained that the same contract is made for one of those taxpayers in such a sense that the city can recover damages in his name. If, then, neither the taxpayer himself nor the city on his behalf can sue the company, the conclusion seems to be that the loss by fire in these cases is regarded by the law as damage for which there is no redress." This is a complete *reductio ad absurdum* and we prefer not to concur in cases, however numerous—there are probably a dozen scattered through half a dozen States—which lead to such conclusion. All these cases (when not based on reference to the others) rest upon the narrow technical basis that a citizen, because not a privy to the contract, can not sue, whereas authorities are numerous that a beneficiary of a contract, though not a party or privy, may maintain an action for its breach. 7 Am. & Eng. Enc. (2 Ed.), 105—108. Here the water company contracted with the city to furnish certain quantities of water for the protection of the property of the citizens as well as of the city, and received full consideration, a large part of which comes in the shape of taxation, paid annually by those citizens. On a breach of the contract, whereby the property of a citizen is destroyed, he, as a beneficiary of the contract, is entitled to sue, and under our Code requiring the party in interest to be plaintiff, he is the only one who can.

Whether there was a breach of the contract and whether it was the proximate cause of the loss, regarded as matters of fact will be determined by the jury, if, when the case goes back, the defendant shall file an answer as it has a right to do (The Code, section 272), raising those issues. But in overruling the demurrer to the complaint there was no error. As was said by the Supreme Court of Kentucky, when affirming, on a petition to rehear, the decision in the Paducah case, *supra*: "The water company did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the standpipe, and if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of the plaintiff's property, which involves issues of fact for determination by a jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract." Affirmed.

(186) SHOAF v. INSURANCE CO.,

127 N. C., 308, 37 S. E., 451, 80 A. S. R., 804—1900.

Civil action on a contract of reinsurance. There was a judgment for the plaintiff, and defendant appealed.

FAIRCLOTH, C. J. Prior to October, 1898, the Merchants' and Manufacturers' Fire Insurance Company, of Baltimore City, in the State of Maryland, issued its policies of insurance on the property of the plaintiffs in the town of Salem, N. C., with the usual stipulations and conditions, and received the premiums therefor from the plaintiffs. During the life of said policies, to wit, on October 4, 1898, the said Merchants' Company and the Palatine Fire Insurance Company, of Manchester, England, doing business in this State, entered into a written contract of reinsurance, in which the Palatine Company agreed to reinsure all outstanding risks of the Merchants' Company for loss or damage by fire, etc., on any property located in the United States and Canada, and assumed all liability under any outstanding policies or risks theretofore written by said Merchants' Company, and on any policy or risk that might be written by the Merchants' Company before November 1, 1898, the later business to be for the benefit of, and under the direction of, the Palatine Company, which company assumed all expenses and taxes connected therewith, and all said risks and policies are reinsured by the Palatine Company. In consideration of such reinsurance, the Merchants' Company agreed to pay one-half of the unearned gross *pro rata* premiums on all policies in force on October 1, 1898, to furnish complete schedules of all policies, to retire from business and to transfer and deliver its good will, right, title, and interest in its business, daily reports, endorsements, registers, and books of record to the Palatine Company, except office fixtures, furniture, etc., with a provision of release on failure to perform the obligations of said contract. The tenth article of said reinsurance contract provides that it shall only be effective as between the parties thereto; that no holder of a policy in the Merchants' Company shall be entitled to enforce this contract against the Palatine Company; that the holders of such policies shall prosecute against the Merchants' Company any claim arising under said policies; and the Palatine Company "agrees to pay all such claims legally arising and duly proved; and further, in case of any contest arising in connection with, or suit being brought for, or on, any such claim, said Palatine Company agrees to defend the same, and pay all costs and expenses incident thereto." This agreement was signed by the two companies, and the plaintiffs were not parties thereto. Subsequently the insured prop-

erty was destroyed by fire, and the plaintiffs, having performed the conditions of their policy, instituted this action against the Palatine Company alone.

The question is, can the plaintiffs, upon these facts, maintain their action? This question has not until now been before this court. There is some diversity of opinion in the decisions of the courts in our sister States and the general authorities. There is no question raised as to the validity of the insuring and reinsuring contracts, each being in due form, and supported by a valuable consideration. A policy of fire insurance is a contract of indemnity (*Darrell v. Tibbitts*, 5 Q. B. Div., 560); and such contract gives the insurer an insurable interest in the property insured, co-extensive with its liability (*New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend., 359). A contract of reinsurance seems to be a union and blending of the business of the two companies, presumably for the advantage of each party. The reinsurer absorbed the estate and rights of the reinsured, and assumed the risks and liabilities of the reinsured, with the privilege of the reinsured, in the present case, to continue issuing new policies for a time specified, with the same rights and liabilities under the new policies as under those already outstanding; this to be done for the benefit of, and under the direction of, the defendant. The plaintiffs were neither a party to, nor in privity with, said contracts. The question is, have they an interest in, or arising out of, the contract? The defendant is bound to indemnify the reinsured for all risks and loss, and the reinsured, at the same time, is bound to indemnify the plaintiffs for risk and loss. Does the defendant's liability inure to the benefit of the plaintiffs, and, if so, can the plaintiffs directly enforce their claim for loss against the defendant? The unearned premium at the date of the contract was a part of the consideration passing to the defendant for its risk and liability assumed. In this unearned premium the plaintiffs had an interest at the time of the reinsurance.

The principle sanctioned by several respectable authorities is this: If A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract against A, although C is not privy to the consideration received by A. The case before us seems to come within the same principle. Our Code (section 177) provides that every action must be prosecuted in the name of the real party in interest, etc. In all the cases close attention is given to the language of the agreement. In the present case the defendant expressly assumes the liability in case of loss, but agrees to pay to the Merchants' Company only after claims have been duly proved in an action against the Merchants' Com-

pany. The defendant also agrees, in the event of such litigation, "to defend the same, and pay all costs and expenses incident thereto." We see no reason why the plaintiffs should be required to first sue the Merchants' Company, and then, in case of that company's insolvency, have to sue the defendant on its contract. The defendant has all the means and information necessary to make a just defense.

We can see no reason why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. The defendant suggests no such danger, but relies solely on the ground that it has no contract with the plaintiffs. *Johannes v. Ins. Co.*, 66 Wis., 50, is decisive on this question. It does not appear clearly, either from the statement, or the opinion, whether the promise was to pay the loss to the insured, or the reinsured, but the reasoning in the opinion does not consider that material. It is the implied right, arising out of the express agreement of the defendant, that enables the plaintiffs to maintain the action. The defendant relies on the provision in Art. X, of its contract as a protection against any action of the plaintiffs against that company. If the plaintiffs have a right to sue the defendant, as we think they have, the two companies can not, by any agreement between themselves, to which plaintiffs are not a party, defeat that right. The defendant says, in its brief and oral argument, that "the first and leading question in the case relates to the right of the plaintiffs to sue the defendant upon the policies, and to the liability of the latter, even if a good cause of action upon the policies has accrued to the plaintiffs." That is the crucial point in the case, and that we have considered. Our conclusion on that point, already stated, renders further investigation unnecessary. Affirmed.

For other cases on the right of the beneficiary to sue, see *Anders v. Gardner*, 151—604; *Withers v. Poe*, 167—372 (overruling *Morehead v. Wriston*, 73—398); following *Gorrell v. Water Co.*, *supra*, see *Morton v. Washington Light & Power Co.*, — N. C., —, 84 S. E., 1019, where all the cases are given, and the decision seems to turn upon whether the contract in question was made before the decision in the *Gorrell* case.

For list of cases on the beneficiary theory in this State, see *Wood v. Kincaid*, 144, p. 395. *Gastonia v. Engineering Co.*, 131—363; *Lacy v. Webb*, 130—545; *Voorhees v. Proctor*, 134—591, sustain the cases of *Gorrell v. Water Co.*, and *Shoaf v. Ins. Co.*, and distinguish the cases in 73—398, 98—324, and 118—822. *Jones v. Water Co.*, 135—553, is like 124—328, and cites 128—375, 109—327, 116—658. For cases in accord with *Gorrell v. Water Co.*, see 52 L. R. A., 305; 61 L. R. A., 509; 63 L. R. A., 727. *Contra*, 15 L. R. A., 375; 21 L. R. A., 653; 23 L. R. A., 146; 25 L. R. A., 257, very full note; 28 L. R. A., 532; *Hone v. Presque Isle Water Co.*, 104 Me., 217, 71 Atl., 769, 21 L. R. A. (N. S.), 1021; *German Al. Ins. Co. v. Home Water Supply Co.*, 226 U. S., 220, 42 L. R. A. (N. S.), 1000. As to indemnity contracts, see 51 L. R. A., 241, 653; 53 L. R. A., 390, 609; *Clark v. Bonsall*, 157—270, 48 L. R. A. (N. S.), 191; *Supply Co. v. Lumber Co.*, 160—428, 42 L. R. A. (N. S.), 707.

For general discussion of right of third person to sue, see 7 Am. & Eng.

Encyc., pp. 104-110; Clark Cont., 352-357; 3 Page Cont., secs. 1307, 1322; 9 Cyc., 374; Pollock Cont., 237; 6 R. C. L., 882; Baxter v. Camp, 71 Conn., 245, 71 A. S. R., 169; 15 Harv. L. Rev., 767; 16 *Id.*, 43.

Where the right of the third party has been recognized, it seems that there must be some obligation existing between the promisee and the third person, as in the leading case of Lawrence v. Fox, 20 N. Y., 368.

It is sometimes held that this rule does not apply to contracts under seal, because the basis of the action is the implied contract. 3 Page Cont., sec. 1321; Clark Cont., 358; 6 R. C. L., 885.

2. Action by the real party in interest.

(187) YOUNG v. TELEGRAPH CO.,

107 N. C., 370, 11 S. E., 1044, 9 L. R. A., 669, 22 A. S. R., 883—1890.

Civil action for damages, for failure to deliver promptly the following telegram: To J. T. Young, New Bern, N. C.—Come in haste. Your wife is at the point of death. (Signed) J. W. Rice. A demurrer by the defendant was overruled, and the defendant appealed.

CLARK, J. In addition to the ground of demurrer set out in the record, the defendant demurred *ore tenus* in this court, that the complaint did not state a sufficient cause of action, in that the plaintiff was not a party to the contract, and, therefore, could not maintain an action for its breach.

Upon the question whether the receiver can maintain the action, Shearman & Redfield on Negligence, sec. 560, says: "We think, therefore, upon the principle of these decisions, a telegraph company is responsible for its negligence to a person to whom a message is addressed, as well as to the sender. If it were not so, it is obvious that the receivers of telegrams would often receive great damage without any means of redress." There is ample authority to the same effect. Wadsworth v. Western Union Telegraph Co., 86 Tenn., 695; Elwood v. Telegraph Co., 45 N. Y., 549; Ellis v. Telegraph Co., 13 Allen, 227; N. Y. P. Co. v. Dryburg, 85 Pa. St., 298; Aiken v. Telegraph Co., 19 Mo. App., 80, and many others. This, while not the English rule, is stated by Bray on Telegraphs, sec. 65; 2 Thomp. Neg., 847; 5 Lawson's Rights and Rem., sec. 1972, and Wharton Neg., sec. 758, to be the invariable rule in this country. The following may be summed up as the reasons therefor: (1) That a telegraph company is a public agency, and responsible, as such, to anyone injured by its negligence, or, at least, it is the common agent of the sender and receiver, and responsible to each for any injury sustained by them, respectively, by its negligence; (2) that in a case like this, the receiver is the beneficiary of the contract, and the injury, if any, caused by the company's negligence, must be to him; (3) the message is the property of the party addressed, in analogy to a consignee of

goods; (4) that upon the face of the message, such as this, the sender is the agent of the receiver, and the latter, as the principal, can maintain an action for breach of the contract, or for a tort, if injury is done him by negligence in performance of the duty contracted for. "The company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver." 3 Sutherland Dam., 314. This author goes on to state that where there is gross or wilful negligence, the action can be brought either for tort or on contract, and, in case of misfeasance, the company is liable also to third parties as wrongdoers.

Upon authority and reason, we think it clear that the plaintiff could maintain the action, whether it is an action *ex contractu* for breach of the contract of speedy and safe transmissions, or *ex delicto* for negligence and violation of the duty which the defendant owed as a public corporation, or as common agent of sender and receiver, at least nominal damages could be recovered.

[The opinion then discusses the question of damages for mental anguish, and decides that the plaintiff may recover for such cause.]

There are numerous cases to the same effect, all of which are given in the dissenting opinion of Clark, C. J., in *Helms v. Tel. Co.*, 143, p. 394. This case holds that the name of the plaintiff must appear in the message, or his interest be known to the company. But *Cashion's case*, 124—459, holds that where the message relates to sickness or death it is not necessary to disclose the relation of the parties. *Holler v. Tel. Co.*, 149—336; *Penn. v. Tel. Co.*, 159—306; *Betts v. Tel. Co.*, 167—75.

Under the Code practice, every action must be prosecuted in the name of the real party in interest. *Revisal*, 400; *Clark's Code*, sec. 177; *Chapman v. McLawhorn*, 150—166; *Martin v. Mask*, 158—436.

If goods are delivered to the carrier by the consignor to be transported to the consignee, nothing else appearing, the title is presumed to be in the consignee, and he must sue. *Gwynn v. R. R.*, 85—429; *Grocery Co. v. R. R.*, 136—396; *Summers v. R. R.*, 138—295; *Stone v. R. R.*, 144—220; *Manfg. Co. v. R. R.*, 149—261; *Gaskins v. R. R.*, 151—18; *Buggy Co. v. R. R.*, 152—119; but it is also held that the consignor may sue, since he is the party with whom the contract is made. 6 *Cyc.*, 511, 512. Where an administrator paid money to a distributee, upon a promise to refund if any claims arose, the rights of other claimants can be enforced only through the administrator. *Norwood v. O'Neal*, 112—127. Bonds payable to the State must be prosecuted in the name of the State on the relation of every party interested. *Comrs. v. Sutton*, 120—298; *Lacy v. Webb*, 130—545. A trustee may sue without joining the *cestui que* trust. *Clark's Code*, sec. 179. A reservation in a deed can not be made so as to convey title to a stranger, but it may give the grantee notice of an adverse claim. *Redding v. Vort*, 140—p. 571.

Where the parties are numerous, and the question is one of common or general interest of many persons, one or more may sue for the benefit of all. *Clark's Code*, sec. 185; *Branson v. Ins. Co.*, 85—414; *Thames v. Jones*, 97—121; *Jones v. Comrs.*, 107—248; *Nash v. Sutton*, 109—550, 117—231; *Tate v. Bates*, 118—288.

CHAPTER II.

ASSIGNMENT OF CONTRACT.

Sec. 1. By act of the parties.

1. Assignment of liabilities.

(188) WOODLEY v. BOND,

66 N. C., 396—1872.

Civil action on contract. The plaintiff was hired by the defendant's testator as overseer on his farm for a year at \$625. During the year the said testator sold the farm to one Holley, with the understanding that the sale was not to affect the contract of hiring, and that the plaintiff was to stay on the farm for Holley on the same terms. The plaintiff was not a party to this agreement, and when notified of it by Holley, refused to comply, but went to the testator and demanded the full amount for the year's work; the testator refused to pay and plaintiff left the farm. The court charged the jury that upon the sale the plaintiff had a right to put an end to the contract, and was entitled to recover for the time served the proportional part of the sum agreed on for the year. There was a judgment for the plaintiff, and defendant appealed.

DICK, J. . . . The agreement between the plaintiff and testator was a personal contract, and its benefits and obligations did not in any respect pass with the land to Holley. Various considerations, besides the wages agreed upon, may have induced the plaintiff not to enter into the contract. It may be that he would not have served Holley at any price. The contract consisted of mutual engagements between the parties, which established the relation of employer and overseer, and as this relation was ended by the action of the testator, the plaintiff was at liberty to regard the contract as rescinded, leave the farm, and bring suit upon a *quantum meruit* for services rendered at the instance and request of testator. 2 Parsons Cont., 32, 523, 678; Robson v. Drummond, 2 B. & Ad., 303; Planche v. Colburn, 8 Bing., 14; 2 Smith L. C., 18, 19 (notes in Cutter v. Powell).

The principles involved in this case are so well founded in natural justice, that they need no further discussion or citation of authority. There is no error.

Per Curiam.

Judgment affirmed.

(189) RAILROAD v. RAILROAD,

147 N. C., 368, 61 S. E., 189, 23 L. R. A. (N. S.), 223, 125 A. S. R., 550,
15 Ann. Cas., 223—1908.

The plaintiff Railroad Co. executed a lease to the Howland Improvement Co. for its entire road, including among other things therein mentioned "all lands and interests in land, timber, timber rights and contracts now owned by the lessor," and there was a covenant of indemnity that the said Improvement Co. should save the lessor harmless from all damage that might arise from the failure of the lessee to perform all obligations so transferred and assumed. The defendant Railroad Co. succeeded to the rights of the Howland Improvement Co.

Before the lease was executed the plaintiff had made a contract with one Ives to cut and deliver 15,000 cords of wood to be used as fuel in its locomotives, and Ives had cut a large quantity and was proceeding with his contract when the lease was made. After the defendant company took charge of the road, it determined to change the locomotives to coal burners, and refused to carry out the contract which the plaintiff had made with Ives. Ives sued the plaintiff and recovered over \$8,000 damages for the breach of the contract; and the plaintiff sued the defendant to recover the amount so paid to Ives. There was judgment for the plaintiff, and defendant appealed.

Affirmed.

HOKE, J. . . . Recovery is resisted on the grounds chiefly (1) that the contract in question was not assignable; (2) that as a matter of fact it was not assigned. But we are of opinion that neither position can be sustained.

While at common law the rights and benefits of a contract, except in the case of the law merchant and in cases where the crown had an interest, could not be transferred by assignment, a doctrine which Lord Coke attributes to the "wisdom and policy of the founders of our law in discouraging maintenance and litigation, but which Sir Frederick Pollock tells us is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the debtor and creditor," the rule in its strictness was soon modified in practical application by the common law courts themselves and more extensively by the decisions of the courts of equity; and the principles established by these cases have been sanctioned and extended by legislation until now it may be stated as a general rule that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that ac-

tions for breach of same can be maintained by the assignee in his own name.

The general doctrine as to the assignability of rights is very well stated in Pomeroy's Equity Jurisprudence, vol. 3, sec. 1275, as follows: "*What things in action are or are not assignable.*—It becomes important, then, in fixing the scope of the equity jurisdiction, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor, or continue as liabilities against the representatives of a decedent debtor, are in general thus assignable; all which do not thus survive, but which die with the person of the creditor or debtor, are not assignable. The first of these classes, according to the doctrine prevailing throughout the United States, includes all claims arising from contract, express or implied, with certain well-defined exceptions; and those arising from torts to real or personal property and from frauds, deceits and other wrongs whereby an estate, real or personal, is injured, diminished or damaged. The second class embraces all torts to the person or character, where the injury and damage are confined to the body and to the feelings; and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mental, to the person, such as promises to marry, injuries done by the want of skill of a medical practitioner contrary to his implied undertaking, and the like; and also those contracts, so long as they are executory, which stipulate solely for the special services, skill or knowledge of a contracting party."

And an interesting and well-considered article by Prof. Frederick C. Woodard on the assignability of contracts will be found in 18 Harv. Law Rev., vol. 18, No. 1, p. 23. There is an exception, as indicated in the last part of this citation from Pomeroy, to the effect that executory contracts for personal services involving a personal relation or confidence between the parties can not be assigned. Lawson on Cont., sec. 355. And another, equally well established and well nigh as broad as the rule itself, is that executory contracts imposing liabilities or duties which in express terms or by fair intendment from the nature of the liability themselves import reliance on the character, skill, business standing or capacity of the parties can not be assigned by one without the assent of the other. This last exception and the reason upon which it rests are stated by Justice Gray, delivering the opinion in Delaware v. Diebold, 133 U. S., 488, as follows: "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties that it shall not be

assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his right and his obligations, can not be assigned without the consent of the other party to the original contract," citing the case of *Arkansas Co. v. Belden Co.*, 127 U. S., 379. And the same principle is stated in *Clark on Contracts*, 364: "It may be said generally that anything which involves a right of property is assignable, with the exception that rights, when coupled with liabilities under an executory contract for personal service or under contracts otherwise involving personal credit, trust or confidence, can not be assigned."

It is contended that, by reason of those exceptions stated in the authorities referred to, the contract before us was not assignable so as to impose liability of performance on the defendant lessee, but we think the position is not well taken. In the first place, the exception noted arises for the protection of the other party, and if such party assents, as he did in this instance, the restriction no longer exists. But, apart from this, it will be noted that the exception referred to does not arise or apply when the contract is entirely objective in its nature, and gives clear indication that the personality of the other contracting party was in no way considered. *Anson on Cont.*, p. 288; *Clark on Cont.*, p. 360. And this limitation imposed on the exception itself is applied and extended in numerous and well-considered decisions of courts of the highest authority. *Horner v. Wood*, 23 N. Y., 350; *Devlin v. City*, 63 N. Y., 8; *New York v. Railway Co.*, 113 N. Y., 311; *Lantern Co. v. Stiles*, 135 N. Y., 209; *City of St. Louis v. Clement*, 42 Mo., 69; *Galey v. Mellon*, 172 Pa. St., 443; *Tolhurst v. Cement Co.*, H. L. App. Cas. (1893), 414; *Wagon Co. v. Lea & Co.*, L. R. Q. B. (vol. 5, 1879-1880), 149.

In *Devlin v. City of New York*, *supra*, the general principle we are discussing is stated and applied as follows: "1. Where an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by an assignee as by the original contractor, and where the latter has not disqualified himself from a performance of the contract, it is assignable. 2. The assignment by the contractor with a municipal corporation for work is not against public policy so long as the corporation retains the personal obligation of the original contractor and his sureties; and in the absence of anything in the statute which authorized the work prohibiting it, such assignment is valid. It does not terminate the contract or authorize the corporation to repudiate it. 3.

Accordingly held that an assignee of a contract for street cleaning, made between the corporation of the city of New York and another under authority of the act entitled 'An act to enable the supervisors of the county of New York to raise money by tax for city purposes and to regulate the expenditure thereof,' etc. (chap. 509, Laws of 1860), could maintain an action against the city for money due thereon and for damages resulting from a repudiation of the contract and an interference on the part of the city authorities, preventing a further performance."

And in *Wagon Co. v. Lea*, *supra*, Chief Justice *Cockburn*, delivering the opinion, discusses the principle as follows: "We entirely concur in the principle on which the decision in *Robson v. Drummond* (1) rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which consequently can not in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we can not suppose that in stipulating for the repair of these wagons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company or by anyone with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the wagons should be kept in repair; it was indifferent to them by whom the repairs should be made. Thus, if without going into liquidation or assigning these contracts the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we can not think that this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we can not but think that in applying the principle the Court of Queen's Bench, in *Robson v. Drummond* (1), went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary or painting

it once a year preference would be given to one coachmaker over another. Much work is contracted for which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done whether it is done by the immediate party to the contract or by someone on his behalf. In all these cases the maxim, *Qui facit per alium facit per se*, applies."

It will be noted here that, while the case of *Robson v. Drummond*, frequently cited in support of the position that contracts imposing liabilities can not be assigned, is not overruled, there is decided intimation that it has gone too far in the application of this principle, and there is doubt if the case of *Boston Ice Co. v. Potter*, 123 Mass., 28, is not subject to the same criticism. Certainly neither one of these cases can, it seems to us, be supported, except on the theory that there were terms in the contract importing reliance on the personal skill, business standing or methods of the other contracting party. A correct application of the principle established by these cases leads to the conclusion that the contract in question was assignable. It was an ordinary business contract for the delivery of so much cordwood on the lessee's right of way, not requiring or importing any special reliance on Ives' skill or business qualifications. It could be performed as well by one man as another. As a matter of fact, there is testimony to the effect that it was to be done in this instance by convicts and that quarters had already been constructed for their protection and accommodation while doing the work. As said by Justice *Walker* in the opinion of *Ives v. Railroad*, *supra*, "It was a contract of employment in the sense that it was to be performed by means of personal labor, but not in the sense that it was expected that it should be performed by Ives." Nor did the credit or business responsibility of the original parties affect the matter one way or the other; nor that of Ives, for the wood was not to be paid for until it was delivered, and so the defendant assignee was fully protected; nor that of the assignor, for unless Ives had agreed to accept the defendant's responsibility instead and place of the assignor, making it a new contract by way of novation, the assignor would, notwithstanding the assignment, still remain liable. *Crane v. Kildorf*, 91 Ill., 567; *Martin v. Orndoff*, 22 Iowa, 447. And see the article of Prof. Woodard, *supra*, wherein it is shown that the assent of the other party to an assignment does not always necessarily import that the assignor is relieved of liability.

This, ordinarily, is all the books mean when they state the proposition in general terms that a contract imposing liability can not be assigned; that the assignment of such a contract does not, as a rule, relieve the assignor from responsibility. It may be well to

note that we are speaking of the assignment of the contract and not of the transfer of the property about which parties may have contracted. In the last case it is a generally accepted doctrine that, in the absence of an agreement, express or implied, a party who buys property from a vendee, to whom the owner has contracted to sell it, does not, as a rule, come under personal obligation to the owner to pay the purchase price. *Adams v. Wadhams*, 40 Bar., 225; *Comstock v. Hitt*, 37 Ill., 542. We have so held in effect at the present term in *Bridgers v. Matthews*.

The contract in question here, being for the delivery of so much cordwood on defendant's right of way, may be classed with a contract of sale of a given quantity of staple goods having a known market value, and, under the principle established by the authorities referred to, we hold that it was assignable, so as to impose on defendant the obligation to pay for the wood when delivered according to its terms. And we are also of the opinion that by the terms of the lease the contract was, and was intended to be, assigned. . . . If we are correct in our position that the contract was assignable and that as a matter of fact it was assigned, then we are of opinion that plaintiff has the undoubted right to recover of the defendant the amount of the judgment, together with the costs and reasonable attorney's fees incurred in resisting the suit instituted by Ives. . . . Affirmed.

Younce v. Lumber Co., 148—34; *Mueller v. Northwestern Univ.*, 195 Ill., 236, 63 N. E., 110, 88 A. S. R., 201; *Simmons v. Zimmerman*, 144 Cal., 256, 1 Ann. Cas., 850; *Rapplee v. Racine Seeder Co.*, 79 Iowa, 220, 44 N. W., 363, 7 L. R. A., 139; *Sloan v. Williams*, 138 Ill., 43, 27 N. E., 531, 12 L. R. A., 496; 2 Am. & Eng. Encyc., 1017; 4 Cyc., 22; 2 R. C. L., 598.

One to whom an apprentice is bound can not assign his agreement to another; it is a contract of personal confidence. *Futrell v. Vann*, 30—p. 404. A member of a firm can not make the firm responsible for his individual debt without the consent of the firm. *Norment v. Johnston*, 32—89. A agreed to make a certain article for B in payment of a debt; afterwards he took C in as a partner they made the article; they could not claim payment from B. *Joyner v. Pool*, 49—293.

(190) MORRISON v. CHAMBERS,

122 N. C., 689, 30 S. E., 141—1898.

Civil action on a promissory note. The defendant pleaded merger and counterclaim. Chambers sold a tract of land to one Fox, giving bond for title and taking notes for the purchase-money, \$625. Afterwards Chambers executed his note to the plaintiff for \$240, and gave the Fox notes as collateral security. Fox then assigned to the plaintiff his entire interest under the bond for title. The plaintiff sued on the \$240 note, and asked that it be declared a lien on the land and that the land be sold to pay the debt. Chambers resisted the recovery on the ground that by the purchase

of the interest of Fox in the land, the plaintiff assumed the liability of Fox for the purchase-money, and claimed that the plaintiff owed him the difference between \$240 and \$625, and demanded judgment for that amount.

Judgment was rendered for the plaintiff, and defendant appealed.

DOUGLAS, J. . . . We see no error in the judgment. The defendant contends that where a bond for title is given to secure the conveyance of the land upon the payment of the purchase-money the relations of vendor and vendee are similar to those of mortgagor and mortgagee. This is true, but it does not help the defendant. The legal title remained in him after the title bond was given, and still remains in him. His further contention that the legal title was conveyed to the plaintiff *pro tanto* by the hypothecation of the notes for the purchase-money, can not be sustained on any authority. The assignment to the plaintiff of the bond for title simply vested in him the right to demand a conveyance of the land upon the payment of the purchase-money. To that extent he had an equitable interest in the land, but he could not be considered the beneficial owner thereof until such payment. There is no allegation that the plaintiff expressly assumed the payment of the purchase-money, and there is no legal implication to that effect. The vendee may assign his bond for title as security for another debt, just as he could execute a second mortgage if he had originally held the legal title. Because a vendee mortgages his land to the vendor to secure the purchase-money, or any other debt, and subsequently executes a second mortgage to a third party, the second mortgagee can not be held liable to the vendor. There is no privity of contract between them. It is true that the first mortgage must be satisfied before any subsequent encumbrance; but a junior mortgagee can sell subject to the prior lien; that is, he can sell the mortgagor's equity of redemption, or he can abandon his own lien. If the first mortgagee sell and the proceeds are not sufficient to pay the debt, he can obtain judgment for the surplus only against the makers or endorsers of the note. This court has repeatedly held that, "the note evidencing the debt is the personal obligation of the debtor; the mortgage is a direct appropriation of the property to its security and payment. *Capehart v. Dettrick*, 91 N. C., 344; *Bobbitt v. Stanton*, 120 N. C., 253, at page 256. It follows that after the appropriation has been exhausted, the debtor alone can be pursued. The judgment is

Affirmed.

See *Woodcock v. Bostic*, 118—822, *ante* (184).

2. Assignment of rights.

1. AT COMMON LAW AND IN EQUITY.

(191) STEDMAN v. RIDDICK,

11 N. C., 29—1825.

Trover for the value of a slave. The plaintiff presented a bill of sale executed by the defendant to one Voight, and also a bill of sale from Voight to himself for a slave. Voight was not in possession at the time the bill of sale was executed, but the defendant was in possession claiming the slave as his own, and afterwards sold her to another man, who took her out of the State.

The court charged that Voight had but a right of action, which could not be assigned so that plaintiff could maintain his action, at law. There was a judgment for defendant, and plaintiff appealed.

TAYLOR, C. J. At the time when Voight sold the slave to the plaintiff, the defendant had the possession, claiming it adversely against all the world; and the question is whether this chose in action is assignable, so as to enable the plaintiff to sue in his own name. For a chose in action comprehends specific chattels, as well as the right to recover a debt or damages, and extends to every sort of chattel property of which a man hath not the actual occupation, but a bare right to occupy it, and a suit in law is necessary to recover the possession, on account of an adversary claim.

The distinction in our law between choses in action and in possession, corresponds with a similar one in the *civil* and *canon* laws, in which property in possession is termed *jus in re*, property in action, *jus ad rem*. It is a settled maxim of the common law, that no *chose in action* can be granted or assigned, founded upon the policy of preventing an increase of lawsuits, by restraining those who would not assert their own rights from transferring them to others of a more litigious disposition. The rule was doubtless more extensive than any mischief that could be apprehended; and it has accordingly been limited by various exceptions, as by the law merchant relative to bills of exchange, and in some instances *respondentia* bonds, by the acts making bonds and notes negotiable, and to the equitable sanction which is given to the assignment of choses in action for a valuable consideration. In many respects the rule at law is merely formal; for it is held that policies of insurance, and judgments, may be sued for by the assignee in the name of the original claimant. But I know of no authority for the position, that a vendee or assignee may sue for property in his own name, which the vendor or assignor, at the time of sale, could

only recover by suit. It seems to me that much of the mischief which the rule aimed originally to prevent would still arise under such a practice; and it is not called for by the necessity of trade or commerce, or any of those causes which introduced the relaxations. The case of *Morgan v. Bradley* (10 N. C., 559), was determined on its own peculiar circumstances; the steer was turned out in the range a very short time before the sale, at which time both the vendor and the vendee believed it to be still there, and when driven up by the defendant with his own cattle, he believed the steer to be one of them. The possession at that time proceeded from mistake, and could scarcely be considered adverse. The judgment must be affirmed. Affirmed.

See *Smith v. Gray*, 18—42; *Monday v. Siler*, 47—389; *Waugh v. Miller*, 33—235; *Bisph. Eq.*, sec. 162; *Page Cont.*, 1256; *Clark Cont.*, 362; 2 *R. C. L.*, 593.

(192) HOPPISS v. ESKRIDGE,

37 N. C., 54—1841.

DANIEL, J. The bill [in equity] states that Richard Eskridge, by his will bequeathed several slaves to his wife for life, remainder to his daughter, Martha; that Martha married Thomas Lipscombe, and died, in the lifetime of her mother, the tenant for life; that subsequently the tenant for life died; that William Eskridge administered on the estate of Martha Lipscombe, and sold the slaves; that Lipscombe, the husband, assigned by deed to the plaintiff all his equitable interest in the estate of his late wife in the hands of her administrator for the sum of \$1,000. The bill is filed by the assignee against the assignor and the administrator of his late wife, Martha, for an account. . . .

A person, out of possession, can not at law convey anything to a stranger; he can only give a release to one in possession. *Underwood v. Lord Courstown*, 2 Scho. & Lefr., 65. But, in equity, *choses in action* are assignable for a valuable consideration and *bona fide*—*Townsend v. Windham*, 2 Ves., 6; *Whitfield v. Faucett*, 1 Ves., 332, 391—and especially equitable *choses in action*, as in this case; and such assignment is supported in equity on the ground that it is an agreement, by which the assignor is bound to give to the assignee the benefit of that which he has assigned. It is by agreement, in most cases of *choses in action*, that the assignee takes. The covenant of the assignor is, in this court, a disposition of the thing assigned that could be enforced against him. Upon principle, therefore, the right of an assignee of a *chose in action* is derived from his right to call upon the assignor for a specific performance of the agreement between them. He is entitled to whatever interest the assignor himself possesses, or is capable of

procuring. 6 Ves., 394; 2 Roper on Hus. & Wife, 510. While we make these remarks, it may be proper to state that the rule does not extend to land. For every grant of land, except as a release, is void as an act of maintenance, if at the time the lands were in the actual possession of another person, claiming under a title adverse to that of the grantor. Such assignments were offenses in England, both by the common law and under the statutes. 4 Kent's Com. (3 Ed.), 446-450. And all agreements tainted with maintenance or champerty are void in equity as well as at law. Wallis v. Duke of Portland, 3 Ves., 494; Powell v. Knowler, 2 Atk., 224; Stephens v. Bagwell, 15 Ves., 139; Wood v. Downs, 18 Ves., 120; Harrington v. Long, 2 Mylne & Keen, 590. Champerty consists in the unlawful maintenance of a suit, in consideration of a bargain for a part of the thing, or some profit out of it. But in this case, the deed of assignment to the plaintiff appears on its face to be absolute, and for the consideration of \$1,000; the proof is that the plaintiff gave that sum, and there is no evidence of champerty offered by the defendants. The assignor is made a defendant, and he suffers the bill to be taken *pro confesso*; which, we think, is in this case an admission that the assignment was made as stated in the bill, or, at least, precludes the other defendant from raising the objection. The defendant acknowledges a balance in his hands, belonging to the estate of his intestate, of \$1,480.10. Under all the evidence in the case, we are of the opinion that the plaintiff is entitled to a decree for that sum, and also to a decree for an account, if he wishes it. . . .

Per Curiam.

Decree for the plaintiff.

The common law rule as to a conveyance of land held adversely to the grantor was in force in this State (The Code, sec. 1333,) in that it was void only in relation to the person holding the land and those claiming under him, but was valid as to all others. The Code, sec. 177, gave the right of action to the grantee in his own name, whenever he, or any grantor, or other person through whom he may derive title, might maintain such action. Johnson v. Prairie, 94—773. The Code, sec. 1333, was repealed by ch. 42, Laws 1899. See Revisal, 400.

(193) SWEPSON v. HARVEY,

69 N. C., 387—1873.

Civil action, in which there was a judgment for the plaintiff, and the defendant appealed.

READE, J. It appears that the defendants were indebted by bond to one Palmer, and that Palmer made an equitable assignment of the bond before due to one Ireland, and that Ireland made an equitable assignment of the bond before due to the plaintiff. Of all which the defendants had notice, so that the defendants be-

came the debtors of the plaintiff. This was prior to the adoption of the present Constitution, abolishing the distinction between courts of law and courts of equity. And in suing the defendants in a court of law, as the plaintiff did, he was obliged to sue in the name of Palmer, the payee of the bond. And Palmer moved to dismiss the suit, which compelled the plaintiff to file a bill in equity to enjoin Palmer from dismissing, and to compel him to allow the use of his name in prosecuting the suit. Upon the coming in of Palmer's answer denying plaintiff's equity the injunction was dissolved; and then Palmer dismissed the suit at law which the plaintiff had instituted in his name against the defendants. And the plaintiff's equity suit against Palmer was dismissed also. This was in the fall, 1867. In 1868 the new Constitution was adopted uniting the courts of law and courts of equity; and soon afterwards The Code was adopted enabling the real party in interest to sue, and subsequently the plaintiff brought this suit.

1. The defendants' first objection to the plaintiff's right to recover is that the equity suit against Palmer, whether pending or dismissed, is a bar to this action. We do not think so. The object of that equity suit was not the recovery of the debt, but to compel Palmer to allow the plaintiff to use his name in a suit at law upon the bond against the defendants. And his failure to secure the right to sue in Palmer's name is certainly no bar to suing in his own name as soon as that remedy was provided by law.

2. The defendants' second objection is, that after Palmer dismissed the action at law which the plaintiff had instituted in his name against the defendants, they paid off the debt to Palmer. This is their loss, and if done in good faith, it is their misfortune. But still it can not affect the plaintiff's rights. (The court held that there was error in admitting the judgment in the case of Palmer against Ireland for the purpose of showing an assignment to the plaintiff, since the defendant was not a party to that action.)

2. UNDER THE LAW MERCHANT.

(194) MARTIN v. HAYES,

44 N. C., 423—1853.

Action of *assumpsit*, brought on defendant's assignment of a note under seal, as follows: "Due Newton & Hayes nine hundred and thirty-seven dollars—six hundred and sixty-three dollars and seven cents to be paid to J. M. Martin when called upon, and the balance to be paid to said Newton & Hayes for value received of them. Witness my hand and seal. 5th July, 1851.

(Signed) M. Fain. (Seal.)"

Endorsed as follows: "For value received I assign to John M. Martin six hundred and sixty-three dollars and seven cents in this note, with the interest on that amount from 5th July, 1851.
(Signed) G. W. Hayes."

Upon the plea of general issue and no assignment to plaintiff, there was a judgment for the plaintiff, and defendant appealed.

PEARSON, J. In the court below the defendant insisted that to fix him with liability, it was necessary for the plaintiff to prove a demand on Fain, the obligor, and nonpayment by him. His Honor was of opinion that the defendant was liable without such proof.

We are at a loss to see any ground on which the defendant was liable to pay the amount, even if such demand and nonpayment had been proved. He made no *express* promise to pay, and we are left to conjecture that His Honor was of opinion that a promise to pay was implied by some principle of the "law merchant."

According to the "law merchant," which is incorporated into the common law, a bill of exchange may be assigned by *endorsement*. This was an exception to the common law maxim, "*choses in action can not be assigned*," and was forced upon the courts as soon as England aspired to be a commercial nation. A consequence of the assignment was to make the endorser liable for the amount of the bill, provided it was presented and due notice given of its dishonor. The Statute of Anne makes promissory notes assignable in the same way, as inland bills of exchange were assignable according to the law merchant; and our statute makes notes *under seal* for the payment of money, assignable in the same way as inland bills of exchange and promissory notes.

The effect of the assignment is to vest the legal interest in the assignee, and to give him the right to sue in his own name upon the bill, note or bond. As a *matter of course*, therefore, the assignment must be of the whole bill, note or bond. An assignment by *piecemeal* of a part to one man, and a part to another, is an idea unknown to the law merchant, and wholly repugnant to every principle of law and of good sense. If the payee can assign \$663.07 of a bill, note or bond to one man, and keep the balance himself, he may, on the same principle, divide it into smaller parts, and assign portions to fifty different men, all of whom would acquire a legal title, and have a separate cause of action for their respective shares: so, there might be fifty lawsuits for different parts of one note. This is against reason, and is, therefore, not law.

The written statement made on the note by the defendant is not an assignment according to the law merchant for another reason. An assignment can only be made by the payee, or the person having the legal title and right to sue. Newton & Hayes are the

payees, and the defendant, in making the statement, does not profess to act for, or in the name of the firm.

As there has been no assignment, according to the law merchant, and a liability to pay is implied only from the fact of an assignment, it follows that the defendant is not liable, and the plaintiff has no cause of action against him. There is no express promise or guaranty and there is no ground upon which a liability, either absolute or qualified, can be made by implication.

We are aware that there is a general impression among the people, that an assignment of any paper creates a qualified liability, and it is evident from the ground taken by the defendant on the trial below that he supposed his assignment, according to the law merchant, imposed upon him a qualified liability, viz., upon due notice of demand and nonpayment. In this, unfortunately for the plaintiff, there was a mistake. The common law, as distinguished from the law merchant, required an *express guaranty*. The law merchant implied a qualified liability from the fact of an assignment according to the custom of merchants. What the plaintiff calls an assignment among merchants has no legal effect, but is simply an entry or memorandum in writing.

Per Curiam. Judgment reversed, and *venire de novo* awarded.

In *Etheridge v. Vernoy*, 74—800, the payee assigned parts of the note to two different persons, and a suit in equity to which they were all parties was sustained, the first assignee having priority in payment. One holding a bond for title to land may assign part of his interest, and the assignee gets an equitable interest. *Cannon v. Young*, 89—p. 264; 3 Page Cont., sec. 1265.

(195) BANK v. BYNUM,

84 N. C., 24, 37 A. R., 604—1881.

Controversy submitted without action, upon facts agreed. The defendants, Bynum & Daniel, executed an instrument of writing to the Taylor Manufacturing Company for \$250, payable "with exchange on New York, . . . and also all counsel fees and expenses in collecting, . . . expressly providing that the machinery for which the note was given should remain the property of the payees, and "said company have full power to declare this note due and take possession of the said engine and separator at any time they may deem this note insecure, even before the maturity of the same."

The company endorsed the note to the plaintiff before maturity and without notice of any defense. At the time of the endorsement to the plaintiff, the company was indebted to the defendants in the sum of \$305.15, and this is still unpaid.

The court held that the paper was not negotiable, and that de-

fendants were entitled to the counterclaim. From a judgment against it, the plaintiff appealed.

ASHE, J. The only question presented by the appeal is whether the indebtedness to the defendants can avail them as a set-off, counterclaim, or defense against the demand of plaintiff, and that depends upon the character of the writing declared on—whether it is negotiable or not.

The essential element of a negotiable promissory note is, that it should be certain. Certainty, first as to the payee; secondly, as to the maker; thirdly, as to the amount to be paid; fourthly, as to the time when the payment is to be made; and fifthly, as to the fact itself of the payment. 1 Parsons on Bills and Notes, 30. The instrument under consideration is wanting in two of these qualities, to wit, in the amount to be paid and the time of payment. In addition to the specific sum promised, it stipulates for the payment of "all counsel fees and expenses in collecting the note if it is sued on or placed in the hands of an attorney for collection;" and is made payable in current rate of exchange on New York. The stipulation in a written promise to pay a certain sum and also "all fines according to rules," "all other sums that may be due, the current rate of exchange to be added," or "deducting all advances or expenses," have been held to deprive the instrument of the character of negotiability. 1 Parsons, 37.

In *Wood v. North*, 84 Penn. St. Rep., 407, where the action was on a note in which there was a promise to pay a certain sum, and five percent collection fee, if not paid when due, Sharswood, J., says: "It is a necessary quality of a negotiable paper that it should be simple, certain, unconditional, and not subject to any contingency." And it was held in that case that the insertion in the note of the clause, "and five percent collection fee if not paid when due," rendered the note uncertain and destroyed its negotiability.

In Missouri it has been held that an instrument whereby the maker promises to pay a specific sum, and agrees, if the sum be not paid at maturity and the note is placed in the hands of an attorney for collection, to pay ten percent, in an addition as an attorney's fee, is not a promissory note, as a part of the amount agreed to be paid is uncertain and contingent. *Bank v. Gay*, 63 Mo., 33; *Goodloe v. Taylor*, 10 N. C., 458.

But there is another serious objection to the claim set up for the negotiability of this instrument. It stipulates that the payees shall have full power to declare the note due at any time they may deem the note insecure, even before the maturity of the same. This divests it of the quality of certainty in the time of payment, which as has been shown is one of the essential elements of nego-

tiability. The time of payment may be hastened at the option of the payees, and is therefore uncertain. And it has been held in Michigan that it is essential to a promissory note that it be payable at a time that must certainly arrive in the future, upon the happening of some event, or the completion of some period, not depending upon the volition of anyone. *Brooks v. Hargreaves*, 21 Mich., 254.

Relying upon these authorities, we hold that the instrument in question is not negotiable.

The next inquiry is, can the defendants, the note being assigned before maturity, avail themselves of the indebtedness of the assignor to them, as a valid defense to the action?

In the early history of the law, the transfers of all choses in action, including bills and notes, were forbidden by the common law, the rigid rule of which was first relaxed by the use of bills of exchange, which was the result of commercial convenience; and hence the law on this subject is termed the "Law Merchant." Promissory notes were first made negotiable in England, like inland bills of exchange, by the statute of 3 and 4 Anne, ch. 9, and in this State by our Act of 1762, which is a literal copy of that statute. But to attain the negotiability intended to be conferred by that act, it must possess all the attributes of an inland bill of exchange as to certainty, etc.; and if it should lack any of its essential qualities, it would still be a common law instrument and subject to the principles of that law in regard to choses in action. As for instance, where a nonnegotiable note is assigned, the action at law must be brought by the assignee in the name of the assignor; and the assignee is put by the assignment in no better condition than the assignor, and only steps into his shoes, and the note assigned is subject to all the equities and defenses which existed between the original parties before notice of the assignment; and it made no difference whether the note was assigned before or after maturity. The rule that the endorsee of a bill or note before maturity takes it freed from all equities and defenses, except endorsed payments, is a principle of the law merchant, and applies to negotiable instruments, but has no application to notes that are not negotiable. Where an action is brought on a note of the latter class by the assignee in the name of the assignor, the rule is, that the equities set up by the defendant against the assignee must be such as subsisted at the time the defendant received notice of the assignment. 1 Dan. Neg. Inst., 555; 1 Parsons, 46; *Harris v. Burwell*, 65 N. C., 584. But the common law rule that an action by the assignee of a paper that is not negotiable must be brought in the name of the assignor has been changed in this State by section 55 of The Code, so as to enable him to sue in his own name, but

without prejudice to any setoff or other defense existing at the time of or before notice of assignment. This section, it will be seen, makes no change whatever in the law, except as to allowing the assignee to sue in his own name, instead of that of the assignor.

There is no error, and the judgment of the Superior Court of Wilson must be Affirmed.

The term negotiation refers to the transfer of negotiable instruments according to the law merchant, and this involved two rights in the transferee: one to sue in his own name, and the other to take the instrument discharged of all defenses against the original holder. Assignment refers to the transfer of claims other than negotiable instruments, and the assignee was required to sue in the name of the assignor, and took only such rights as the assignor had. By statute, hereafter noticed, the action must now be brought in the name of the assignee as the real party in interest, and the principal distinction is in the rights conferred. *Shaw v. R. R.*, 101 U. S., 557; 2 R. C. L., 636; 4 Cyc., 92.

What is a negotiable instrument is determined by the law merchant, except as modified by statute, and in many of the States the law has been fixed and rendered more uniform by the adoption of the Negotiable Instrument Law. See Revisal, 2151 *et seq.* Under sec. 2152, specifying payment with exchange does not affect negotiability; nor does specifying a particular kind of money, sec. 2155; requiring the payment of an attorney's fee can not be enforced and does not affect negotiability, sec. 2346. Where the contracts are not negotiable in form, they are governed by the common law as to the rights of the parties. *Havens v. Potts*, 86—31; *Wright v. Kenney*, 123—618; *Bank v. Warlick*, 125—593; *Johnson v. Lassiter*, 155—47.

3. UNDER STATUTE.

BANK v. BYNUM,

Ante (195).

In North Carolina, The Code, sec. 41, provides that "all bonds, bills, and notes for money, with or without seal, and expressed or not, to be payable to order and for value received, may be assigned over in like manner as inland bills of exchange are by the custom of merchants in England, and the assignee may maintain an action thereon in his own name, provided the original obligee could have maintained an action." This was enacted in 1762 and 1786, and was following substantially the statute 3 & 4 Anne. In the Revisal of 1905 this was not carried forward, except as included in the Negotiable Instr. Law, and in section 400, which provides that "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. . . . In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any setoff or other defense, existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due." See Pell's Revisal, 400, and cases cited.

WOODCOCK v. BOSTIC,

Ante (184).

RAILROAD CO. v. RAILROAD CO.,

Ante (189).

The general test of assignability of a chose in action is whether or not it would survive to the personal representative. 2 Am. & Eng. Encyc., 1017; Clark Cont., 365. See *Revisal*, 156, 157.

"Contracts other than personal contracts, or contracts containing a provision against assignment, or contracts forbidden to be assigned by statute, may be assigned at modern law." 3 Page Cont., secs. 1259, 1262, 1263; 12 L. R. A., 493; 14 L. R. A., 126; 2 R. C. L., 598; 4 Cyc., 20; *Pearson v. Mil-lard*, 150—303.

A contingent interest or expectancy may be assigned. *McDonald v. Mc-Donald*, 58—211; *Masten v. Marlow*, 65—595; *Fortescue v. Satterthwaite*, 23—566; *Watson v. Dodd*, 68—528; *Bodenhamer v. Welch*, 89—78; *Petty v. Rousseau*, 94—355; *Watson v. Smith*, 110—6; *Foster v. Hackett*, 112—546; *Wright v. Brown*, 116—26; *Taylor v. Smith*, 116—531; *Brown v. Dail*, 117—41; *Kornegay v. Miler*, 137—659. A bare possibility of reverter is not assign-able. *Helms v. Helms*, 137—206. A purchaser at sheriff's sale may assign his bid. *Blount v. Davis*, 13—19. An entry on land is a right that may be assigned. *Bryan v. Hodges*, 107—492. Insurance policy is assignable. *Fertilizer Co. v. Reams*, 105—283. "Unplanted crop is assignable, provided location is definite. *Rountree v. Britt*, 94—104. Claims against U. S. Govern-ment can not be assigned, but the fees of a U. S. Marshal as between him and his deputies may be assigned, *Wallace v. Douglas*, 103—19. A pension payable in the future is not assignable. 48—547; 131—87.

4. MODE OF ASSIGNMENT.

(196) WINBERRY v. KOONCE,

83 N. C., 351—1880.

Civil action, in which there was a judgment for plaintiff, and defendant appealed.

DILLARD, J. The case was this: One Mills had a judgment docketed against W. M. Coston, which was a prior lien to any other on the lands of the debtor. Subsequently Coston executed a mortgage on his land to secure the creditors therein named, and that being duly registered became the second lien on the land, and after the registration of the mortgage the present plaintiff recovered two justice's judgments against Coston and had them dock-eted, whereby he acquired the third lien.

In this situation the two judgment creditors, Mills and Win-ber-ry, issued executions, under one of which, the entire estate in the land, and under the other, only the equity of redemption could have been sold, and when the property was being cried by the sheriff, the plaintiff as he alleges sold his two judgments to Koonce at the price of one-third of their amount, and the money not being paid, this action was brought to recover the agreed price. The defendant by his answer denies any sale, executed or executory, of plaintiff's judgments to him at any price, and to settle the ques-

tion of sale or no sale, the court submitted to the jury the issue: "Did plaintiff sell the judgments to defendant for one-third of their amount?" and the jury in their verdict responded "yes."

[The court then discusses two questions: 1. The consideration, holding that the transfer of the judgments was a sufficient consideration for the defendant's promise to pay, whether he collected anything or not. 2. That while the judgments were a lien on land, they were not any interest in land that required a transfer in writing under the statute of frauds.]

3. The point was taken that judgment should be rendered for defendant, on the ground that what is called an assignment was incomplete and inoperative to pass any equitable right to defendant in the two judgments: It is unquestionable, that while the judgments were assignable, they must have been assigned in such manner as to be legally sufficient to pass the equitable interest therein, or otherwise it would be but executory and the action could not be maintained. No particular mode of assignment is prescribed or required. It may be done with or without writing, and in any form of words, provided the intent to assign be clear and some act be done between the parties amounting to an appropriation, or a constructive delivery. Adams Eq., 54; 2 Schouler on Per. Prop., 676. An intent to sell by one and intent to buy in the other, at a price paid or agreed to be paid, with such conduct or acts as means that the one resigns all future control of the chose, and the other assumes to regard it as his own, is an appropriation *inter se*, and on notice to the party who is to pay it, approximates a delivery of a chattel, and is then called a constructive delivery, and thereupon the right of the assignee is perfected against any possible further control of the assignor. Adams Eq., 55; Schouler Per. Prop., 678. Now here the jury find the sale of the judgments, and by the evidence sent up as a part of the judge's case, taking it most strongly against the appellant, the fact was that after the land was knocked down to the plaintiff, the defendant in execution of the agreement had the entry of the sale to plaintiff changed into his own name, and he then and there rehearsed the terms of the trade and procured an indulgence from the plaintiff for the money which was to be paid him, until the next court. And herein there was plainly the assent of the plaintiff to cease any further control of the judgments, and of defendant to hold himself to be owner, thus making in law an appropriation of the judgments to the defendant; and besides this, there was a recital before Coston, the judgment debtor, of the sale and its terms, and therein the equitable interest of defendant was perfected as much so as by delivery in the case of a tangible chattel. We hold therefore that the assignment was executed and the equitable title passed.

4. It was urged that the judgment docket stood in the name of the plaintiff and he still had control and therefore judgment should not be entered for the plaintiff. The answer is, it might be most desirable that the assignment should have been entered of record, but it was not necessary. It is enough if the assignment be made in such manner as to give defendant the right to go into court and have the aid of the court to enforce the judgments, upon any proof of ownership, whether by record or other.

5. Upon the point as to the measure of damages, the assignment of the judgments being determined to be a sufficient consideration, it is evident that the plaintiff was entitled to recover the third of the judgments as held by the court below.

There is no error in His Honor's rulings upon the numerous points made by the defendant against the rendition of the judgment on the verdict of the jury, and the verdict must be affirmed. Let this be certified.

(197) WALLSTON v. BRASWELL,

54 N. C., 137—1853.

PEARSON, J. . . . In our case an executor held a residuary fund to be divided among the children of the testator. The husband of one of the children assigned his share. Afterwards the executor, having no notice of the assignment, took his note without security and paid off debts at his request, with an express understanding that the amount advanced should be deducted from his share. We think it clear that he is entitled to a credit for the amount in a settlement with the assignee.

Such an interest is not assignable at law. Equity permits it to be assigned, but to guard against fraud the assignment is considered imperfect until consummated by notice to the trustee. It is supposed that prudent men will make inquiries of him before dealing with the *cestui que trust*; and the object of requiring notice to be given to the trustee is to put it in his power to give correct information.

In regard to land, fines and common recoveries, which are matters of record, livery of seizin and the enrollment of deeds of bargain and sale give notoriety to the change of ownership. A lease for years is consummated by the entry of the lessee, the purchaser of chattels may take them into possession (if he fails to do so it is a strong badge of fraud, *Twyne's case*), and the change of possession is evidence of a change of ownership. The endorsement of negotiable instruments or the possession of the paper, when payable to bearer, shows for itself; but a trust, when the subject is personal property and chuses in action other than negotiable in-

struments, are not susceptible of actual possession, and equity, pursuing the analogy of the law in allowing the assignment, requires that the change of ownership shall be shown by giving notice to the trustee or the person liable, which is taken as tantamount to a change of possession. Notice is necessary to perfect the assignment so as to deprive the assignor of any subsequent control. *Adams Eq.*, 54. Before notice is given to the trustee or person liable the assignment is binding upon the assignor and volunteers and all who are affected with notice, but the assignment is imperfect and is put on the footing of a mere contract of purchase. After such notice the title is perfect and the assignee has a complete right *in rem*. . . .

No particular form of assignment required. An order payable out of a particular fund may be an assignment either in whole or in part; so with a check for an entire deposit; but a mere promise to pay out of a particular fund is not an assignment, nor is a simple check on a deposit. *Bispham's Eq.*, sec. 167. *Nimocks v. Woody*, 97—1; *Bank v. Bank*, 118—783; *Perry v. Bank*, 131—117; *Hawes v. Blackwell*, 107—196; 79—p. 136; 105—11; *Hall v. Jones*, 151—419; *Revisal*, 2339; 4 *Cyc.*, 29, 37; 2 *R. C. L.* 614, 620.

Notice to the adverse party is necessary to complete the assignment as between him and the assignee, but not between the assignor and assignee. This notice must be plain, positive and direct information; mere rumor is not enough. "Debtors are bound to seek their creditors, but they are not bound to search the world, but may pay the original creditor, unless distinct notice of the right of the assignee is brought home." 17—p. 279; *Bispham's Equity*, secs. 168, 169. Something in the note may be notice, as a note payable to guardian. 36—340; for further instances of notice, see 65—175; 94—122; 104—589; 109—291; 111—243; 111—516; 114—543; 131—405; 135—428; *Bisph. Eq.*, sec. 168; *Chem. Co. v. McNair*, 139—326; *Clark Cont.*, 366; *Page Cont.*, secs. 1271-1282; 4 *Cyc.*, 32; 2 *R. C. L.*, 622.

(198) DAVIDSON v. POWELL,

114 N. C., 575, 19 S. E., 601—1894.

Civil action against defendants as endorsers of two notes under seal. One Davis executed notes to John A. Powell for \$138.90, and he endorsed them, "I assign over the within note to S. M. Powell;" and S. M. Powell endorsed them, "For value received I assign over the within note to G. A. Davidson." The defendants claim that they are not liable as principals, sureties or endorsers, and that the transfer to plaintiff was with the understanding that they were not to be liable. There was judgment for plaintiff, and defendants appealed.

MACRAE, J. The endorsement of a note, as generally understood, is its transfer or assignment by writing upon its back, although a negotiable note may be transferred without endorsement. If endorsed it may be, and generally is, in blank, it having long been the practice for the counsel to fill up the blank on the trial, if an action is brought upon it. The blank may be filled by the

holder in any way which will not enlarge the liability of the endorser. The usual words by which the endorser may limit his liability are "without recourse;" and by these or similar words it is at once understood that the endorser is not to be held liable unless it turns out that the note is not a valid obligation of those whose names are upon it.

The exact and legal meaning of the word "endorsement," as applied to notes and bills, is "the transfer of a negotiable note or bill by the endorsement of some person who has the right to endorse. Nor can there be an endorsement in this sense of the word, except by the payee of the bill; but he may be the original payee, or he may have become, by previous endorsement, a second or subsequent payee." 2 Parsons Bills & N., 1. To assign is to transfer to another. Abbott's Law Dictionary. A bill or note may be assigned by delivery, and without endorsement, in which case his liability is somewhat different from that of an endorser. Dan. Neg. Instr., sec. 730. When assigned or transferred by endorsement he becomes simply an endorser unless, by the terms of the assignment, his liability is limited. When, as in this case, he uses the words, "I assign over the within note to S. M. Powell," and S. M. Powell endorses, "For value received I assign over the within note to G. A. Davidson," there is no restriction upon their liability.

The effect of endorsements, where expressions like those used in our case are employed by the endorser, is discussed in 1 Daniel, *supra* (sec. 688c), where he states his conclusion thus: "It is from the fact that a payee assigns a bill or negotiable note by endorsement of his name on the back of it that the law implies his liability as an endorser. His relation to the instrument creates the implication, and the circumstance that he sets forth that relation in express terms does not change it, for the maxim applies, '*Expressio eorum quae tacite insunt nihil operatur*.' Did the payee intend merely to pass to title, he should use the words 'without recourse,' or some phrase of equal import."

By section 50 of The Code, "Whenever any bill or negotiable bond or promissory note shall be endorsed, such endorsement, unless it be otherwise plainly expressed therein, shall render the endorser liable as surety to any holder of such bill, bond or promissory note." In the hands of the original payee an endorsement may be shown to be upon certain conditions; but a *bona fide* holder for value before maturity and without notice is not affected by any equities existing between the original parties. The same rule will apply between the last payee and all subsequent endorsers.

It appears that the note in question was assigned by endorsement of the original payee to S. M. Powell before maturity and

by him to plaintiff after maturity. His Honor, therefore, presented an issue to the jury, "Was it the understanding of the parties at and before the trade that the notes would be endorsed by S. M. Powell to plaintiff?" which was answered in the affirmative.

It follows from what we have said that there was no error in the refusal of His Honor to give the instructions asked by defendants. The effect of the endorsement was to make the endorsers liable under the statute; and if there was a different agreement between the parties by which the plaintiff was bound the burden was upon the defendants to show it.

There is no error.

Affirmed.

A debt may be verbally assigned. *Ponton v. Griffin*, 72—362. A bond or note payable to A or bearer is transferable by delivery, but one payable to A or order, is transferable by endorsement and delivery, to become complete. *Fairley v. McLain*, 33—158; *Tyson v. Joyner*, 139—69; *Revisal*, 2178-2199. Section 50 of The Code, mentioned in the above case, has not been carried forward in the *Revisal*, and the liability of the endorser is fixed by the *Negotiable Instr. Law, Revisal*, 2215; while if not negotiable, the liability of the assignor or other parties is determined by the effect of their agreement. *Johnson v. Lassiter*, 155—47; *Barden v. Hornthal*, 151—8.

An endorsement to a person deceased is a nullity. 63—475. A chattel mortgage may be assigned with or without seal, and assignment need not be registered. *Hodges v. Williamson*, 111—56. A qualified endorsement may be shown by parol evidence between the immediate parties, but not as to remote parties. *Bank v. Pegram*, 118—671; *Sykes v. Everett*, 167—600.

5. EFFECT OF ASSIGNMENT.

(199) KING v. LINDSAY,

38 N. C., 77—1843.

Appeal from interlocutory order of court of equity. On February 21, 1840, the defendant, Lindsay, contracted to sell the plaintiff 400 bushels of corn, to be delivered next day, for 1,280 pounds of bacon, to be delivered on the 15th of April following. They executed separate covenants to each other for the performance of this agreement, and Lindsay gave the plaintiff a letter to a person in whose care he said the corn was. Lindsay then went to another county, and there assigned the plaintiff's covenant to one Black, a defendant, in satisfaction of a debt of \$75 and for the further sum of \$55. Lindsay's agent did not deliver the corn to the plaintiff, but said it had been seized under attachments, and Lindsay left the country. Black, the assignee, sued plaintiff on his covenant for the bacon and recovered judgment, and this suit is brought for an injunction against enforcing said judgment. Black alleges that plaintiff got some corn, and that he is a purchaser for value and without notice of the plaintiff's right against Lindsay.

The court issued the injunction and continued it to the hearing, and the defendant, Black, appealed.

RUFFIN, C. J. In the view of this court the two covenants growing out of the same contract and executed at one and the same time, are to be taken together and regarded as one instrument; and although at law, from the forms of pleading, the present plaintiff could not avail himself of the default of Lindsay in not performing the agreement on his part, but was obliged to submit to a judgment for the value of the articles, which he contracted to deliver, yet there is no principle of equity better settled than that a person shall not insist upon the execution of a contract by another, when he, himself, has failed and is unable to fulfill the stipulations on his part, which formed the inducement to the other party to enter into the contract. It is a case in which the consideration wholly fails; but as that can not be shown at law, when the contract is in the form of independent covenants in separate instruments, the plaintiff is under the necessity of coming here to restrain the other party from the unconscientious use of that legal advantage. There is a clear equity in favor of the plaintiff against Lindsay, who can not be allowed to make the plaintiff pay for what he never got and can not get. That equity, indeed, was but feebly questioned at the bar; but the case was put on another point.

It was said that an equal or superior equity arises in favor of the other defendant, Black, as a purchaser for value and without notice of the plaintiff's equity. But that is contrary to settled principles. For the advantage of trade and the credit of negotiable paper, the assignee of such instruments, before their dishonor, held them as absolute owners both at law and in equity, without any regard to the state of the dealings between the original parties, unless the assignee have notice that his assignor ought not to pass off the paper. That is by force of the law merchant, or the statutes which authorize and encourage the negotiation of those instruments, and consequently should protect those who innocently take them. But for that reason it is clear that an assignee could have only the rights of the assignor; since the latter can pass no more than he has. And such, therefore, is the rule of equity in respect to the assignment of *choses in action* or instruments not legally negotiable. The rule has been often laid down and never disputed. In *Coles v. Jones*, 2 Ver., 692, it is said that the assignee, though he comes in upon full and valuable consideration, takes a bond (not negotiable) subject to the same equity, as it was in the obligee's hands. In *Taston v. Benson*, 2 Vern., 764, it is again said that the assignment to the creditors did not alter the case; a bond, being assignable only in equity, is still liable to and attended with the same equity, as if remaining with the obligee. And in the same case, as reported in 1 Pr. Wms., 496, the doctrine and the reasons for it are yet more fully stated. It

is there declared that the assignee is in no better condition than the assignor; for suppose one should assign over a satisfied bond as security for a just debt, the assignee could not set it up in equity, as it receives no new force from the assignment. And it was laid down that it was incumbent on anyone, who took an assignment of a bond, to be informed by the obligor concerning the *quantum* due upon it; which, if he neglected to do, it was his own fault, and he should not take any advantage of his own laches. In truth, the assignee of a *chose in action* gets no title to it, properly speaking, and can not be said to be a purchaser without notice. He gets only the right to use the assignor's name to enforce the claim, and therefore to recover what the assignor might; and the very nature of the subject warns him of the necessity of inquiring respecting the obligor's equity, and, therefore, amounts to notice of such equity. If, upon inquiry, the obligor misinform him, or if the obligor acquiesce in the assignment, and delay for a long time to bring forward his equity, such conduct might vary the rule, and give the assignee rights, which the assignment itself would not. The general principle has also been long recognized in this State; *Welch v. Watkins*, 2 N. C., 369, and was recently acted on by this court in *Moody v. Sitton*, 37 N. C., 381. The present plaintiff has by no conduct of his impaired his equity, as between him and Black; and, therefore, the latter stands merely in the place of Lindsay, and the plaintiff has the right to have deducted from the judgment against him the value of such part of the corn as he did not receive and interest thereon. What that was will, of course, be the subject of inquiry in a future stage of the cause, and in the meantime the injunction was properly continued.

It will, therefore be certified to the court of equity that there is no error in the decree appealed from; and the appellant must pay the costs of this court.

Per Curiam.

Ordered accordingly.

Under the present practice the action must be brought by the assignee in his own name, and everything can be adjusted in one action. *Vaughan v. Davenport*, 157—156, 159—369; *Stewart v. Price*, 64 Kan., 191, 64 L. R. A., 581.

(200) *MILLER v. THAREL*,

75 N. C., 148—1876.

Civil action on a bond. In May, 1872, the defendant sold to one Houston a tract of land for \$1,600, receiving \$300 in cash and Houston's note for \$1,300. Later he repurchased from Houston at \$1,800, giving his note for that amount, taking a bond for title, and surrendering Houston's note for \$1,300 which was to be cred-

ited on the \$1,800 note. In about two weeks they rescinded this contract, the defendant surrendering the bond for title, and Houston giving up, as was supposed, the defendant's note, which was at once destroyed. Afterwards, and before maturity of the note, Houston transferred the defendant's note to the plaintiff in exchange for certain notes which plaintiff had against him as collateral security; and before the transfer Houston changed the credit from \$1,300 to \$130. The plaintiff had no notice of such defects, and took the note for value. There was a judgment against the defendant for \$570, and he appealed.

RODMAN, J. When the contract for the sale of land from Houston to Tharel was rescinded, and Tharel gave up to Houston the bond for title which Houston had made to him, and received from Houston a paper which Houston said and Tharel believed was the note now sued on, and Tharel destroyed that paper, the liability of Tharel on the note was as much discharged as if he had paid it in money. The case is the same in effect as if he had received the note and put it in his pocket, from which it was afterwards stolen, and the same as if he had received and torn it in pieces and thrown them away, and the pieces had been afterwards picked up and so artfully put together that the tearing could not be detected. It must be concluded that *at that time* he was under no legal or equitable liability by virtue of the note to anyone.

It then only remains to consider whether such liability subsequently arose, by reason of the transfer of the note by Houston to the plaintiff, under the circumstances stated in the case. The note was *under seal* and was payable to Houston *or bearer*. Notwithstanding this, it is to be regarded, so far as its negotiability is concerned, and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note [not] under a seal, and payable to a payee or order. The Act of Assembly, Rev. Code, chap. 13, sec. 1 (Bat. Rev., chap. 10, sec. 1), enacts in substance: "All notes signed by any person . . . whereby such person . . . shall promise to pay any person . . . the money mentioned in such note, shall be considered to be by virtue thereof due and payable to such person . . . to whom the same is made payable, and the person . . . to whom such money is payable may maintain an action for the same as they might upon inland bills of exchange; and the same as likewise all *bonds, bills and notes for money, with or without seal, and expressed or not to be payable to order, or for value received, may be assignable over in like manner as inland bills of exchange are by the custom of merchants in England*; and the person . . . to whom such promissory note, bill, bond or sealed note is assigned or endorsed may maintain an action against the person . . .

who shall have signed such promissory note, etc., or any who shall have endorsed the same, as in cases of inland bills of exchange: *Provided*, etc.

It is conceded that Houston transferred the note to the plaintiff for a valuable consideration before its maturity, in the regular course of business, and without actual notice, or anything from which notice would be implied, of any defense to it. If Houston had *endorsed* the note to the plaintiff at the time of such transfer he would thereby have passed the legal title according to the law merchant, and the plaintiff's right would probably have been good against the maker by whose misfortune or negligence it had been permitted to remain in the hands of the payee after it had been paid. We say *probably*, because it is not necessary to decide the question. The note sued on was not endorsed to the plaintiff, but was assigned to him by an oral contract. It is true that under this assignment, by virtue of our recent legislation (C. C. P., sec. 55), the assignee may sue in our courts in his own name, as an equitable assignee or *cestui que trust* could formerly have done in equity; but he does not acquire by such assignment the peculiar rights by which the law merchant founded on the policy of promoting the circulation of promissory notes, attached to the *endorsee* of such paper. All the authorities from Parsons on Bills and Notes, cited by the learned counsel for the plaintiff, to sustain the proposition that a holder of a promissory note, taken under the circumstances stated, can recover against the maker, notwithstanding any equitable or other defense, such as payment before maturity, he may have, apply only to holders who hold by an assignment recognized by the law merchant, viz., an endorsee. The distinction between a title by assignment and by endorsement is stated, but not as clearly as it might be, in 2 Pars. Notes and Bills, 526. It is also made in *Thigpen v. Horne*, 36 N. C., 20; *Lindsay v. Wilson*, 22 N. C., 85.

The case of *Whistler v. Forster*, 14 C. B., 248 (108 E. C. L. R.), which probably escaped the attention of Mr. Parsons, is in point and is decisive of the question. The defendant drew the check sued on before the 3d day of October, and handed it to Griffiths without any other consideration than a promise to furnish funds to take it up, which he failed to perform. On the 3d of October Griffiths gave the check to plaintiff for value, but did not then endorse it. Afterwards he did. At the time the plaintiff received the check he had no notice of the way in which Griffiths had obtained it, but at the time of the endorsement he had. The judgment was for the defendant. The observations of *Willis, J.*, are so clear that I extract from them:

"The general rule of law is undoubted that no one can transfer

a better title than he himself possesses. *Nemo dat quod non habet*. To this there are some exceptions; one of which arises out of the law merchant as to negotiable instruments. . . . This rule, however, is only intended to favor transfers in the ordinary and usual manner whereby a title is acquired according to the law merchant and not to a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, now indeed recognized, and in many instances enforced by courts of law; and it is, therefore, clear that in order to acquire the benefit of this rule the holder of the bill must, if it be payable to order, obtain an endorsement, and that he is affected by notice of fraud received before he does so. Until he does so he is merely in the position of the assignee of an ordinary chose in action, and has no better right than his assignor." To the same effect is *Haskill v. Mitchell*, 53 Me., 468.

The right of the plaintiff to recover, if it has any foundation at all, must stand not on his having the legal title, or any principle of mercantile law, but on his having some equity which makes it unconscientious in the defendant to refuse payment. It is said that such an equity arises out of the fact that the defendant, by his negligence, permitted the note to exist and to remain in the hands of Houston after it had been discharged by payment, and thus enabled Houston to commit a fraud on the plaintiff; and that the maxim applies that where one of two innocent persons must suffer by the fraud of another, he must be the victim whose negligence enabled that other to commit the fraud. The rule is not disputed, but probably it will be found to be confined in its application to cases in which the defendant is guilty of some complicity in the fraud, or where by his negligence, he has enabled the person committing the fraud to pass a legal right to the plaintiff. In this last case the maxim would apply that where equities are equal the legal title will prevail. But where no legal title passed the case would come under the maxim that where the equities are equal the prior equity prevails. The authorities to this effect are very numerous. In *Turton v. Benson*, 1 Pr. Wms., 496, the payee of an unnegotiable bond assigned it to one of his creditors as a security, and it was held that the maker could avail himself of an equitable defense. The Master of the Rolls said: "Supposing a man should assign over a satisfied bond, the assignee could not set up this bond in equity, which being satisfied before, could receive no new force from the assignment." On appeal Lord Chancellor Parker considered all the arguments which could be used by the plaintiff in this case, considering him as a mere assignee, and confirmed the decree.

See 2 vol., 2 part, *Leading Cases in Eq.*: Note to *Royall v.*

Rowles, 218—36; Moody v. Sutton, 37 N. C., 382; King v. Lindsay, 38 N. C., 77; Mosteller v. Bost, 42 N. C., 39.

We think there was error in the judgment below.

Per Curiam. Judgment reversed, and judgment that defendant go without day and recover his costs in this court.

(201) LEWIS v. LONG,

102 N. C., 206, 9 S. E., 637, 11 A. S. R., 725—1889.

Civil action on a note under seal, executed by Aaron Prescott and W. W. Long to J. W. Grizzard, and endorsed by him to Mrs. Cooper, for value before maturity and without notice of any equity, and by her endorsed to plaintiff for value, after maturity and without notice. Long was only surety on the note, and this was known to Grizzard, but not to Mrs. Cooper nor to plaintiff. More than three years had elapsed since the maturity of the note, and Long relied upon this as a defense. There was a judgment against Long before a justice of the peace, and he appealed to the Superior Court, where judgment was rendered in favor of Long, and the plaintiff appealed.

SHEPHERD, J. Whether a joint promisor may show by parol that he signed only as surety, has been the subject of conflicting decisions, both in England and America. That he can do so in this State, where the payee has notice, is well settled. Capell v. Long, 84 N. C., 17; Goodman v. Litaker, 84 N. C., 8; Welfare v. Thompson, 83 N. C., 276.

But such a defense can not be made against a *bona fide* holder without notice. Randolph Com. Paper, sec. 907; Daniel Neg. Inst., sec. 1338; Edwards Bills and Notes, vol. 2, 692; Goodman v. Litaker, *supra*.

The note sued upon was under seal, but was endorsed, and is "to be regarded, so far as its negotiability is concerned, and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal." Miller v. Tharel, 75 N. C., 150; Spence v. Tapscot, 93 N. C., 246.

It was endorsed to Mrs. Cooper, and the law presumes that she took it "for value and before dishonor, in the regular course of business." Tredwell v. Blount, 86 N. C., 33.

Mrs. Cooper being a *bona fide* holder, and, having no notice, would have been unaffected by the defense relied upon in this action. Does the fact that the plaintiff purchased from her after maturity (but without notice) put him in a worse position than that occupied by his assignor? Very clearly it does not. Mr. Randolph (*supra*), sec. 987, says: "So a purchaser after maturity from a *bona fide* holder, who took the paper for value, before ma-

turity, is entitled as a *bona fide* holder, before maturity, to the rights of his endorser."

To the same effect is Edwards, *supra*, vol. 2, 692, note; Daniel, *supra*, sec. 695.

The cases of Harris v. Burwell, 65 N. C., 586, and Capell v. Long, *supra*, cited by the defendants, do not conflict with this view. In the former case the plaintiff purchased the note after maturity, and, therefore, took it subject to the defense of "set-off," which the maker had against his assignor at the time of the assignment. In Capell's case the payee had notice, and assigned after maturity. In both of these cases it was held that the purchaser took subject to any defense which existed against their assignors. In our case, as we have seen, no defense existed against Mrs. Cooper, the plaintiff's assignor, and it is, therefore, clearly distinguishable.

Error.

Reversed.

(202) HARRIS v. BURWELL,

65 N. C., 584—1871.

The defendant executed a note to one Merryman, payable on December 25, 1866; on December 1, 1866, Merryman endorsed the note for value to Hughes; the defendant paid Hughes \$280, which with a debt due from Hughes to defendant was more than the amount of the note; on May 7, 1867, Hughes endorsed the note for value to the plaintiff; the defendant set up the debt of Hughes as a setoff against the plaintiff. There was a judgment for the plaintiff, and defendant appealed.

PEARSON, C. J. The case presents the question whether a note assigned after maturity is subject in the hands of the assignee to any setoff or other defense existing at the time of the assignment, against the assignor. In Neal v. Lea, 64 N. C., 678, it is held that by the proper construction of C. C. P., sec. 101, no collateral demand against the assignor can be set up against the assignee, and "that to make it available, the demand must have attached itself to the note in the hands of the assignor; for instance, a payment made to him not entered on the note, or a claim, which the assignor had agreed should be taken in satisfaction;" and for reasons therein set forth, this court adopts the principle of Borough v. Moss, 10 B. & C., 558 (21 E. C. L., 128), which had been departed from by Haywood v. McNair, 19 N. C., 283.

Sec. 55, C. C. P., was not called to the attention of the court upon the argument, or the consideration of Neal v. Lea, and was cited for the first time upon the argument of this case at the last term; we find that section has a most important bearing upon the

question, and is expressed in words so plain and direct as to control the construction of sec. 101, for it abrogates the principle of the common law, that a chose in action can not be assigned; confers an unlimited right to assign "anything in action," arising out of contract, and subjects the assignee to any setoff or other defense existing at the time of or before notice of the assignment. The only saving being in regard to "negotiable promissory notes and bills of exchange, transferred in good faith, and upon good consideration before due." This language is as broad as it can well be; so that a note assigned after it is due, a half dozen times, will be subject to any setoff or other defense that the maker had against any one or all of the assignees at the date of the assignment, or before notice thereof. The effect will be to put a very effectual check to the trading of notes after maturity, and to put it in the power of debtors to buy up claims against their creditors and take the control entirely in their own hands. Whether this be good or bad policy is a matter with which the courts have no concern—"it is ours" to expound the law, not to make it, and although not very pleasant, it is our duty to correct any misapprehension into which we fall, and to do so in plain and direct terms, and as soon as may be after becoming satisfied of the error in order to avoid the inconvenience that might otherwise result. *Neal v. Lea* is overruled. . . . The judgment of the Superior Court is reversed.

Assignment.—The assignee of an ordinary chose in action gets only such interest as his assignor had at the time of assignment, or when the adverse party had notice of the assignment. 37—382; 65—382; 70—283; 84—552; 86—31; 3 Page Cont., sec. 1269. There is a conflict of opinion in regard to the equities of intermediate assignees. *Martin v. Richardson*, 68—255; *Adrian v. McCaskill*, 103—182; *French v. Barney*, 23—219; 3 Page Cont., sec. 1271; 46 L. R. A., 753; 25 Am. & Eng. Encyc., 532; *Bisph. Eq.*, secs. 168-171; 4 Cyc., 91; *Vann v. Marbury*, 100 Ala., 438, 14 So., 273, 23 L. R. A., 325; *Bills and Notes*, Cent. Dig., sec. 1355; *Cumberland Bank v. Hann*, 18 N. J. L., 222; *Revisal*, 400. An increase in the contract price of railroad ties goes to the assignee, 50—111; but the assignment of a judgment, which had not been properly docketed and thereby lost its lien, does not entitle the assignee to sue the clerk for such failure, though this right might have been assigned. *Redmond v. Staton*, 116—140.

Endorsee for value, before maturity and without notice, takes free from all equities that the maker or any one claiming under him might have against the payee. *Lawrence v. Weeks*, 107—119; except (1) where the paper is void by statute; (2) where the original consideration is illegal or fraudulent, or it is taken as collateral, the right of recovery is restricted to the consideration actually paid before notice. *Bank v. McNair*, 116—156. A note payable on demand is dishonored unless presented within a reasonable time. 19—338; 44—40. If endorsee has notice, he takes subject to equities. *Hurlburt v. Douglass*, 94—122; *Bank v. Hatcher*, 151—359; *Smathers v. Hotel Co.*, 162—346; *Revisal*, 2205.

The endorsement of a negotiable instrument transfers title and implies (1) that the note is genuine and valid; (2) that the amount specified is due. 79—p. 170; 2 Pars. Bills, 26 to 29; 1 Dan. Neg. Instr., sec. 669; *Revisal*, 2214, 2215. Liability of endorser, 15—122. Endorsement in blank is presumed to

be a transfer, but may be shown to be a receipt. 64—570. Name of payee stamped on a note may be an endorsement, but it does not prove itself. 139—69; 140—640.

For value means for a fair and reasonable price, 20—420; 76—82; 132—109; 137—317. Execution and endorsement admitted or proved, it is presumed to be for value, and possession and production of the paper makes a *prima facie* case. 36—p. 453; 86—33; 105—407; but when fraud is shown, the endorsee must show that he is a *bona fide* holder for value and without notice. 108—63; 110—267; 116—122; 115—335; 113—481; Revisal, 2208. A collecting bank is not a purchaser for value. 113—485; 114—335; 114—343; 118—548; 118—566; Bank v. Oil Mills, 150—718; whether a preexisting debt is a sufficient consideration to constitute a purchaser for value, so as to take discharged for defenses, is regulated by Revisal, 2173; Brooks v. Sullivan, 129—190; Smathers v. Hotel, 162—346; Bank v. Seagroves, 166—608; R. R. Co. v. Bank, 102 U. S., 14.

A qualified endorsement may be shown as between the immediate parties, but not as to remote holders. 118—671. A note endorsed by one not named in the note, the liability is presumed to be that of an endorser. Revisal, 2345; Lilly v. Baker, 88—151; Hoffman v. Moore, 82—313; Barden v. Hornthal, 151—8. A holder with notice taking from one without notice is protected, but a surety may notify the holder that he is a surety and take advantage of the statute of limitations, if suit is not brought within three years thereafter. Coffey v. Reinhart, 114—506.

A note endorsed after maturity or assigned without endorsement, unless payable to bearer, is subject to the equities of the maker against the payee. 2—273; 19—283; 28—107; 33—331; 33—505; 42—39; 50—360; 86—49; 127—464. The same is true of a note under seal. Formerly they could not be made payable to bearer, but after endorsement they were like other negotiable paper. Marsh v. Brooks, 33—409; Pate v. Brown, 85—166; Spence v. Tapscott, 93—246; Christian v. Parrott, 114—215; if transferred without endorsement, or endorsed by one without authority, it is subject to equities. Spence v. Smith, 101—234; Bresee v. Crumpton, 121—122. It seems that a bond as negotiable paper is now like a promissory note so far as assignment is concerned. Revisal, 2155. A strictly personal agreement does not bind the assignee, as where the assignor hired a slave upon condition that he was not to be used in a certain way, 33—421; a note which is part of the assignor's personal property exemption, loses that quality by assignment, 104—642; A contracted to sell land to B and took notes for the purchase money; he then conveyed the land to C and assigned the notes to him; C could enforce payment, 78—37. When a draft with a bill of lading attached as security is discounted in due course, the holder has an interest in the property to the amount of his claim, and is not liable to the consignee for any breach of warranty between the original parties. Mason v. Cotton Co., 148—492, 18 L. R. A. (N. S.), 1221; overruling Finch v. Gregg, 126—176, 49 L. R. A., 679; nor can the assignee retain the price of such goods against such assignee for any debt due him by the consignor. Manfg. Co. v. Tierney, 133—631; see also Haas v. Cit. Bank, 144 Ala., 562, 39 So., 129, 1 L. R. A. (N. S.), 242; Cosmos Cot. Co. v. First Nat. Bank, 171 Ala., 392, 54 So., 621, 32 L. R. A. (N. S.), 1173; Springs v. Hanover Nat. Bank, 209 N. Y., 224, 103 N. E., 156, 52 L. R. A. (N. S.), 241.

Possession of unendorsed note raises presumption of ownership as between the holder and maker, but not between the holder and payee, Jackson v. Love, 82—401; Holly v. Holly, 94—670; 87—191; 116—64; 121—122; 132—68; nor when a relation of trust or agency exists. 116—616. But the mere introduction of a note with endorsement is not sufficient evidence to vest the title and defeat equities. 139—69. Possession of an open account is no evidence of title. 111—74; a mere holder of an insurance policy has no interest in it. 127—138; but a transfer by the president, though not in the form required, is valid. 134—60.

Assignment of a note and mortgage to a third person does not vest the title to the property nor the power of sale in the assignee. Williams v.

Teachey, 85—402; Dameron v. Eskridge, 104—601; Hussey v. Hill, 120—312; Burris v. Brooks, 118—789; Norman v. Halsey, 132—6; Collins v. Davis, 133—106; but a transfer even by delivery without endorsement carries with it the security. 41—269; 63—624; Jenkins v. Wilkins, 113—532; 129—67. The assignment of the mortgage without the debt is invalid. 20 Am. & Eng. Encyc., 1033. A conveyance of his interest in the land by deed by the mortgagee may carry with it the power of sale. Morton v. Lumber Co., 154—336; Weil v. Davis, — N. C., —, 84 S. E., 395.

Where the interest is assigned pending suit, the action may be continued in the name of the assignor or assignee. 63—475; 115—385; 120—264. A judgment may be assigned subject to equities, and the assignee may sue on it in his own name. 94—265; 99—233; 109—150; 132—62; 23 L. R. A., 335.

A surety who pays a judgment or bond satisfies it, unless he has it assigned to a third person for his benefit. 14—253; 14—380; 21—366; 57—262; 101—589; 113—197; 115—38; 116—62; 129—114; 15—424; 74—250; 87—294; 36—190; 8—483; Bank v. Hotel Co., 147—594; Livermore v. Cahoon, 156—187; other courts hold that the payment itself may operate as a transfer. 37 Cyc., 418; Nelson v. Webster, 100 N. W., 411, 68 L. R. A., 513.

A bill of exchange, payable to a third person and protested, when taken up by the drawer, can not be put in circulation again; but a negotiable note, coming back to the original payee, may be again negotiated without prejudice to previous endorsers. 2—214; 24—417. A took B's note for the purchase-money of land, and endorsed it to C; C sued A and recovered judgment; A paid the judgment and had the note reassigned to him, and then endorsed it to D; D could recover the amount from B, the first judgment being only on the contract of endorsement. 87—399.

For collection.—A endorsed a note to B for collection and B endorsed it to C, after maturity, for value and without notice; C got a valid title. Parker v. Stallings, 61—590; Hill v. Shields, 81—250; 69—93; 76—410; 91—7. An attorney holding a note for collection has no authority to endorse it in his own name or his principal's, 114—136; where A gave a note to her son to give to a lawyer for collection, and the son sold it to B, the title did not pass, 68—341. An assignment for collection did not make the assignee the real party in interest, so as to sue in his own name, Abrams v. Cureton, 74—523; Boykin v. Bank, 118—566; Revisal, 2186; or any assignment for the benefit of the assignor, 77—277; but if the assignee is to collect the money and apply it to other debts in his hands, he is a trustee, and may sue. Wynne v. Heck, 92—414. As to what constitutes holder in due course, see Revisal, 2201, 2208.

A bill of lading for goods not actually received does not bind the carrier, even when transferred *bona fide* for value, 93—42; 9 L. R. A., 263; Peele v. R. R., 149—390; Roy v. N. Pac. R. R., 42 Wash., 572, 85 Pac., 53, 6 L. R. A. (N. S.), 302; Thomas v. R. R., 85 S. C., 537, 34 L. R. A. (N. S.), 1177.

Sec. 2. Assignment by operation of law.

1. Transfers of interests in land.

(203) BARBEE v. GREENBERG,

144 N. C., 430, 57 S. E., 125, 12 Ann. Cas., 967—1907.

Civil action to recover possession of a storehouse. There was a judgment for the defendant, and plaintiff appealed.

HOKE, J. It appears, from the facts found by the trial judge, that the storehouse in question belonged to *feme* plaintiff, Virginia E. Barbee, and that on 14 August, 1903, she and her husband, W. R. Barbee, executed and delivered to A. S. Greenberg and J. Dean,

a mercantile firm doing business under the name and style of A. S. Greenberg & Co., the premises in question for three years, "with privilege of three years more," from 11 August, at \$55 per month, R. W. Winston, Esq., to collect the first year's rent and W. R. Barbee to collect the balance; that said lease was duly registered, and the lessees entered upon their occupation and possession of the property in the transaction of the firm's business.

That some six or eight months after the lease had been executed Dean sold his interest in the firm to A. S. Greenberg, and A. S. Greenberg continued the business under the firm name of A. S. Greenberg & Co. That W. R. Barbee knew that J. Dean had sold his interest to A. S. Greenberg about twelve months after the signing of the lease, and continued to collect the rents from A. S. Greenberg to the expiration of the lease.

That in May, 1906, before the three years' lease expired, A. S. Greenberg gave formal notice that he had determined to avail himself of "the three years additional referred to in the contract, and that he would continue to occupy the store for the three years beginning 11 August, 1906. (Signed) A. S. Greenberg & Co., successors to Greenberg & Dean."

That in February, 1906, W. R. Barbee and wife leased the store to their coplaintiff, M. Bane, to commence 11 August, 1906, and on that day this suit was instituted in the names of W. R. Barbee and wife and M. Bane against the defendant, to recover possession of the property; that after the institution of the action the rent was tendered monthly by defendant, which was at first declined, but afterwards, and pending the proceedings, was received and receipted for by W. R. Barbee.

Upon these facts, the court adjudged the plaintiffs are not entitled to recover possession of the property and that defendants are entitled to remain in possession of same for three years from 11 August, 1906.

By the terms of the lease the storehouse was granted to Greenberg & Co. for three years, ending 11 August, 1906, "with privilege of three years more." Whether notice was required to be given during the term of the lessee's election to renew is not material here, for such notice was given; and if the firm of Greenberg & Co., as now constituted, had the right to demand a renewal of this lease for its own benefit, then this right can be available as a defense for the present action, though the same was instituted before a justice of the peace. *McAdoo v. Callum*, 86 N. C., 419; *Lutz v. Thompson*, 87 N. C., 334; *Levin v. Gladstein*, 142 N. C., 482.

These covenants to renew are not required to be in any technical form (*McAdoo v. Callum*, *supra*; *Am. & Eng. Enc.* (2 Ed.), vol.

18, 685), and when sufficiently definite will be enforced as incident to the lease; and, as such, conferring a right which constitutes a part of the tenant's interest in the land itself.

This being true, in the absence of any restraining covenant, the right may be assigned as an incident of the lease and the benefit enforced by the assignee; and being a covenant which runs with the land, it will also be enforced against the lessor or his assigns. Taylor on Landlord and Tenant (9 Ed.), sec. 413; Cyc., vol. 24, 996; Piggott v. Mason, 1 Paige, 412; Betts v. June, 51 N. Y., 274; Blackmore v. Boardman, 28 Mo., 420; McClintock v. Joyner, 77 Miss., 678; Cook v. Jones, 96 Ky., 273; Brook v. Bulkley, 2 Ves. Sr., 497.

In Taylor on Landlord and Tenant it is said: "The right of renewal constitutes a part of the tenant's interest in the land; and, in the absence of a covenant to the contrary, may be sold and assigned by him and the benefits of the right may be enforced by the assignee."

In Wood on Landlord and Tenant, *supra*, it is said: "A covenant for the renewal of the lease on the landlord's part is often inserted in a lease; and when it is, it is binding upon the landlord and his grantees or assignees, as such covenants relate to the land and pass with it." And, on page 944, the author further says: "The right of renewal constitutes a part of the tenant's interest in the land; and, unless restricted, may be sold or assigned by him, and the benefits of the covenant pass to the assignee and may be enforced by him." And in Cyc., *supra*, it is stated: "These covenants to renew are not personal, and the legal successor of the lessee, as well as the lessor, are entitled to the benefits and are burdened with the duties and obligations which such covenants confer on the original parties." See also Revisal, sec. 1586.

An application of the principles indicated by these authorities fully sustain the trial judge in holding that, on the facts of the case, the plaintiffs have no present right to recover possession of the premises in question.

There was no stipulation in this lease restraining the lessees from a sale or assignment of their term. True, when the lease was made, the firm of Greenberg & Co. was composed of A. S. Greenberg and J. Dean. But it is found as a fact that, six or seven months after the execution of the lease, said Dean sold his interest in the firm to A. S. Greenberg, who continued the business under the firm name of A. S. Greenberg & Co. The lease was an asset of the partnership, which passed to the purchaser, and with it the incidental right to demand a renewal. Betts v. June, *supra*; Blackmore v. Boardman, *supra*.

In this last case it was held: "A covenant for the renewal of

the lease is an incident of the lease and will pass by an assignment of the unexpired term."

We were referred by counsel to the cases of *Finch v. Underwood*, Chancery Div., 2, 310; *James v. Pope*, 19 N. Y., 324; *Howell v. Benlor*, 41 W. Va., 610, as authorities against the view which we have taken of the case; but we do not so understand these decisions. [The court then discusses and distinguishes these cases.]

If the cases cited are capable of the interpretation put upon them by counsel, we would not hesitate to hold that they are not well considered in that they contravene the principle we have held as controlling on the facts of the present case; that in the absence of a restraining covenant, the lease, with the incidental right of renewal, is assignable; and the present firm, having taken such assignment during the existence of the former term, and having complied with all the stipulations of the lease, and being the sole owner of the right and interest arising by reason of the covenant to renew, is entitled to remain in possession of the premises, and plaintiff's demand for present recovery was properly denied.

Affirmed.

If the lessee assigns a part or all of the premises for the whole of the term, it is an assignment and not a subletting. *Lunsford v. Alexander*, 20—166; privity of estate and privity of contract exist between the lessor and assignee, but not between the lessor and sublessee. *Krider v. Ramsay*, 79—354; *Alexander v. Harkins*, 120—452; *Mordecai's Lectures*, 508. Same point as principal case, *Greenville v. Gornto*, 161—341.

Rent accrued does not pass to the assignee of the reversion. *Kornegay v. Collier*, 65—69; *Wilcox v. Donnelly*, 90—245; *Young v. Young*, 115—105; but rent not accrued passes as incident to the reversion. *Bullard v. Johnson*, 65—436; *Revisal*, 1987, 1988.

(204) *BLOUNT v. HARVEY*,

51 N. C., 186—1858.

Action on the case for the obstruction of an easement. Benjamin Edwards and James Edwards being tenants in common of a mill, Benjamin, for valuable consideration, conveyed his moiety to James, in fee. The deed is executed by both, and contains this clause: "And the said James doth for himself and his heirs covenant and agree to and with the said Benjamin and his heirs, that he, the said Benjamin, and his family, shall and may have the privilege of grinding, sawing and picking cotton at the mill, toll-free, for his family use; and further, that if Benjamin shall, at any time hereafter, settle either one of his sons at the bridge place, that such one of his sons as may be there settled, shall have and enjoy the privilege of grinding, sawing and picking cotton for himself and his family, free from toll, but this privilege is intended to extend no further than to such son, during his life, and for his

own family use." James died intestate, and the land descended to his children, who, with their mother, filed petition and had the land sold under order of court, and defendant became the purchaser, and he refused to allow Benjamin to use the privilege above granted. Benjamin began this action and died, and his executor was made a party.

The defendant contended that this was a mere personal covenant, and was not an easement attaching to the corpus of the land, but His Honor being of a different opinion, there was a judgment for the plaintiff, and defendant appealed.

PEARSON, C. J. (after stating the facts). The right of action is put on the ground that the legal effect of this clause is a grant of the easement or privilege of grinding, toll-free, and not a covenant, whether merely personal or one running with the land.

The words are strictly those of a covenant, and a construction converting them into a grant can only be justified if supported by some direct authority, or very clearly by "the reason of the thing."

We have examined the cases cited on the argument, and do not consider any of them "in point." Besides the words "covenant and agree," the word "grant," or some synonymous term, is used in all the instruments which are construed to be grants, and in respect to leases for years, it may be remarked, that "an agreement to lease," and a "lease," differ very slightly, not only in the terms necessary to make them, but in legal effect, for a lease is a contract to permit one to occupy and take the profits of land for some stated time, and is perfected by entry; whereas, a covenant to permit one to grind at a mill, toll-free, and a grant of such an easement, differ very widely, both in legal effect and in respect to the persons and things to which it may extend.

The "reason of the thing," so far from supporting the construction contended for, as it seems to us, tends the other way; at all events, it does not preponderate so decidedly as to overcome the difficulty of converting mere words of covenant into a grant.

The rule "*ut res magis valeat quam pereat*" has no application. If an instrument can not operate in the mode which, from its terms, the parties seem to have intended, under this rule, effect is given to it by allowing it to operate in some other mode; for instance, if a deed uses terms of "release only," and the relation of the parties does not admit of its operation as a release, effect will be given to it, as a deed of "bargain and sale," provided it express a valuable consideration which will create a use, and sets out the quantity of estate intended to be conveyed, together with a description of the premises. In our case, the deed will not perish, but will avail in the mode which, from its terms, the parties seem to have intended, *i. e.*, a covenant.

The argument that to treat it as a grant will be most beneficial to the vendor, "cuts both ways," for of course it would be less so to the vendee; and would fetter his estate as a clog upon alienation. The parties were brothers, and while the privilege was to be exercised by members of the family, and amicable relations were kept up, it might do, but in the hands of a stranger, it would be impracticable. The idea that a stranger is to have a right to go to another man's mill, and use his machinery for grinding, sawing or picking cotton, is out of the question. No sensible man could be induced to buy on such terms. The argument is against the plaintiff in another aspect—that of public policy—as said by Lord *Brougham*, in *Keppel v. Bailey*, 2 Mylne & Keene, 577: "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient to the science of the law and the public weal that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves or their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no detriment and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands a peculiar character which should follow them into all hands, however remote."

The remaining argument, which is the one most relied on, drawn from the covenant as to ponding back the water, and which, it is contended, must be allowed to operate as a grant of the easement, is alike inconclusive. The clause is as follows: "And it is hereby covenanted and agreed by and between the said parties, that the said James, his heirs and assigns, shall, at no time hereafter, be liable to any action or demand for damages which may arise from the overflowing of any part of the lands of the said Benjamin, which are not contained in this indenture, which may be occasioned by the erection or raising of the milldam of the said mill." In respect to the easement of overflowing the land as the mill-pond then was and had been used, it was implied as an incident of the grant of the mill, and the covenant was superfluous. In respect to the supposed right to make the dam higher, and overflow more land, *ad libitum*, two questions of doubtful construction are presented: Was it the intention to confer any such right? If so, was a covenant relied on to secure its enjoyment, or was a grant intended? One matter of doubtful construction can derive but little aid from another. The analogy, however, fails, in several respects. In the covenant as to overflowing the land, the word "assigns" is used, and it is likewise used in each of the three covenants, at the con-

clusion of the deed, *i. e.*, of seisin, of quiet enjoyment, and for further assurance; but it is omitted in the covenant under consideration. It may be that the word has no legal effect upon the covenants where it is used, but it sometimes has a very important effect. See notes to Spencer case, 1 Smith's Leading Cases, 75, and the omission of it in one covenant shows that the parties considered it, or intended it, to be of a different nature from the covenants in which it is used.

The right to overflow more land may have been considered necessary to the full enjoyment of the mill, and being connected with the property, ought to be of like duration in time; but the privilege of grinding, etc., toll-free, is a thing collateral, or constituted merely a part of the price; for, by reason of it, the vendor was able to take less for the mill; and being collateral, full compensation can be made in damages. This view is much strengthened by the fact that the privilege, in respect to the son, is expressly for life only, and is impliedly so in respect to the vendor, being restricted to the use of his family.

Upon the whole, there is nothing to convince us that the parties intended to do more than the terms used import, *i. e.*, the one to make, and the other to accept a covenant, for the purpose of securing the enjoyment of the limited privilege stipulated for; and we are unwilling, by a strained construction, to produce a consequence "inconvenient to the science of the law and the public weal."

There is error; judgment reversed, and *venire de novo*. As the facts were not contested, it is to be regretted that the case was not put in shape for final judgment.

Per Curiam.

Judgment reversed.

(205) NORFLEET v. CROMWELL,

70 N. C., 634—1874.

Civil action upon a covenant of defendant's assignor. In 1855, the plaintiffs were in the possession and use of a canal lying partly on their own lands and partly on the lands of others, of whom defendant was one. It passed near to, but did not touch certain lands of one Gregory, which, upon his death, descended to one Lloyd, and after his death was purchased by the defendant from Lloyd's devisees.

The agreement between the plaintiffs fixed the terms for the use of the canal for drainage, and how the expense should be paid by each person. In 1858, they made an agreement with Lloyd, that he, his heirs and assigns, might drain his lands into the canal under certain conditions, and under the same rights, privileges and burdens as the original parties had. In 1860, the devisees of Lloyd conveyed the land to the defendant in fee, "with all the privileges,

easements, appurtenances, rights, advantages, burdens, and encumbrances." After this deed was made, the plaintiff's intestate did some work on the canal, and called on the defendant to pay Lloyd's share of the expense, and upon his refusal to do so, this action was brought.

There was a judgment for the plaintiff, and defendant appealed.

RODMAN, J. (after stating the facts and discussing the right of eminent domain involved). The defendant contends that the covenant of Lloyd does not run with the land. His counsel endeavored to distinguish the present case from that in 64 N. C., 1, by reason that it appeared, or was assumed there, that the canal was, in part, situated on the Lloyd lands, when it appears now that it does not touch either piece, although it is near enough to them to affect them somewhat.

The language of Lord Coke in Spencer's case (1 Smith L. C., 23), does not require a physical touch. "But although the covenant be for him or his assigns, yet if the thing to be done be *merely collateral* to the land, and do not *touch or concern* the thing demised in any sort, there the assignee shall not be charged." In this case the thing to be done is to pay for work done on a canal which does not touch the land of the covenantor, but is to his benefit, and the way in which it was contemplated to obtain that benefit more fully and directly was by connecting the land with the canal by a ditch, which must, of course, touch the land; and its not being *in esse* at the time makes no difference when assigns are mentioned. Looking at the whole agreement, of which the covenant was a part, it is clear that it did directly concern the land.

Many cases have held that where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced in equity against an assignee of the covenantor, with notice, as the defendant here is. *Tulk v. Moxhay*, 2 Phil., 776; 22 Cond. E. Ch. R.; 11 Bew., 571; *Western v. McDermot*, 1 Eq. R., 449, 2 Ch. Ap., 72; *Barrow v. Richard*, 8 Paige, 351; *St. Andrew's Church*, appeal, 67 Pa., 512.

Independently of this, however, there are two arguments which might be out of place in a mere court of law, but which a court of equity is entitled to notice, that must be considered conclusive of the question:

1. The consideration for the covenant was the grant of an easement which became appurtenant to the land, and passed with it to the defendant on his purchase. This easement he has accepted and enjoyed, and it is his only title to drain the land into the canal. The principle is generally conceded, and it is certainly equitable, that when the benefit and burden of a contract are inseparably connected, both must go together, and liability to the burden is a

necessary incident to the right to the benefit. *Qui sentit commodum sentire debet et onus*. Notes to Spencer's case, 1 Smith L. C., 143; *Savage v. Mason*, 3 Cush., 318; *Coleman v. Coleman*, 7 Harriss, 100.

2. If Lloyd had obtained his right to drain into the canal by proceeding under the Revised Code, chap. 40, as he might have done, it is clear by section 13 that the obligation to contribute to repairs would have run with the land. When the same rights are obtained and the same burdens assumed by a contract which expressly stipulates that the burdens shall run with the land, there can be no reason why such a stipulation must be held unlawful and forbidden to have that effect. If Lloyd had proceeded under the act, he might have made the defendant a party for the purpose of condemning his intervening lands; but the defendant would not have been a party to that part of the proceedings which gave Lloyd a share in the canal and adjusted his duties with the other owners, for the defendant had no share in the canal and no concern in those matters.

3. Defendant contends plaintiffs had no right to permit strangers to the decree of the court to drain into the canal, whereby a greater quantity of water and sand has been brought down upon his lands than was contemplated in the decree, and that by such misuser of their rights they forfeited them.

1. The first answer which may be given to this proposition is, that the defendant is not in court as the owner of the lands which he owned at the time of the decree, and which are the lands injured by the misuser, but as the assignee of Lloyd, and the whole issue is upon his liability as such. The Lloyd lands are not injured by the misuser, and that in other respects he is injured, is not pertinent to the issue. Besides, Lloyd could not complain of the alleged misuser. He derived his right from the new owners, and by his covenant with them admits their rightful ownership, and the defendant stands in Lloyd's shoes in respect to the Lloyd lands. If the defendant is damaged in these, by the omission of the parties to the covenant to repair the lower portion of the canal, the covenant points out his remedy. He may determine what repairs are necessary and do them, and compel contribution from the other parties.

2. Supposing, however, that the defendant can avail himself of a defense not open to his assignor, and assuming that the lands which he owned at the date of the decree are damaged by the misuser, is his remedy by defeating the present action?

The principle established by the authorities cited by the learned counsel we conceive to be this: If the owner of an easement over the land of another *unlawfully* enlarges it to the injury of the

owner of the servient land, the easement is lost or suspended during the continuance of the misuser. Washburn, 538; Jones v. Tapping, 11 C. B. N. S., 283; Wood v. Copper Miners Co., 14 C. C., 428; Sharpe v. Hancock, 7 Man. & Gr., 354.

In the last case the easement was a right to drain over the land of the defendant; the plaintiff altered that part of the drain which was on his own land so as to throw an increased quantity of water into that part of it on defendant's land, and *which the defendant was bound to maintain in repair*, thereby increasing his burden. In the present case, the defendant (independently of his liability as assignee) is under no obligation to repair. The conclusive answer to the defendant's proposition is this: The Act of 1795 implicitly allows, and the Revised Code expressly provides that strangers to the original decree may drain into the canal (sec. 9), and it would be absurd to hold that what may be done *in invitum* may not be done by the voluntary agreement of the parties. The possible future enlargement of the use of the easement was contemplated in the grant of it, and was therefore not unlawful. If, however, the defendant is damaged by such a change; if the capacity of the canal at its mouth is insufficient to vent the increased quantity of water flowing down, or if the owners of the canal neglect to repair it, so that the water spreads over the defendant's land, it is clear that he has a remedy.

The acts cited and the common law cast on the owners of the easement the burden of repair. Washington, 564; Egremont v. Pulman, Moody & M., 404; Bell v. Twentymen, C. B., 766. But a right of the defendant to damages for a breach of this duty would not relieve him from the present liability.

Per Curiam.

Judgment affirmed.

Where an easement is granted, reserving \$20 a year, it is not rent, but a covenant to be enforced by an action of debt; the grantee of the land would take it subject to the easement, and would be entitled to the compensation. Raby v. Reeves, 112—688. See also Barringer v. Trust Co., 132—409.

Covenants restricting the use of land will be enforced against the parties and those taking with notice. Cobb v. Clegg, 137—153; Herring v. Lumber Co., 163—486; Parrott v. R. R., 165—295; Guilford v. Porter, 167—366; Newbold v. Peabody Heights Co., 70 Md., 493, 17 Atl., 372, 3 L. R. A. 579; Chippewa Lumber Co. v. Tremper, 75 Mich., 36, 42 N. W., 532, 4 L. R. A., 262; Hawley v. Kafitz, 148 Cal., 393, 83 Pac., 248, 3 L. R. A. (N. S.), 741; Evans v. Foss, 194 Mass., 513, 80 N. E., 587, 9 L. R. A. (N. S.), 1039, 11 Ann. Cas., 171; Sprague v. Kimball, 213 Mass., 380, 100 N. E., 622, 45 L. R. A. (N. S.), 962, Ann. Cas., 1914 A, 431; Sjoblom v. Mark, 103 Minn. 193, 14 Ann. Cas., 125; Ames Cas. Eq. Juris., Parts I-VI, 135; 11 Cyc., 1077; 7 R. C. L., 1114.

Covenants in a deed which run with the land,—warranty and quiet enjoyment; not running with the land—*seisin*, right to convey, and against encumbrances. Mordecai's Lectures, pp. 757, 778, 783, 799, *et seq.*; 3 Page Cont., secs. 1285, 1289; Wiggins v. Pender, 132—628 (61 L. R. A., 772), where the subject is fully discussed. The covenant can not be assigned separate from the land. Lewis v. Cook, 35—193; Ravenal v. Ingram, 131—549; Smith v. Ingram, 132—p. 963. It does not extend beyond the estate granted. 35—

193; 48—312. The word "assigns" is not necessary. 132—p. 632, overruling 130—100. Covenant of quiet enjoyment. 18—94. Duty to keep a bridge in repair. 66—287; Revisal, 2697. A grantee accepting a deed poll is bound by its conditions, though he does not sign it, and his assigns are also bound. 76—158; 23 L. R. A., 376; 11 Cyc., 1080; 7 R. C. L., 1105.

2. By Marriage.

(206) O'CONNOR v. HARRIS,

81 N. C., 279—1879.

Harris and his wife were married in 1865, and in 1867 sued the wife's guardian for settlement; in 1873, while this suit was pending, Harris assigned to O'Connor his interest in the estate; afterwards Harris compromised the suit with the guardian, with the understanding that the guardian was to pay over about \$1,800 for the benefit of the wife; O'Connor claimed that this arrangement was made after notice of the assignment to him, and that he was entitled to the interest in the estate. There was a judgment for the plaintiff, and the defendant appealed.

DILLARD, J. . . . The appeal presents this question: Did the assignment by Harris to J. O'Connor in 1873 have the effect to pass to the assignee a right to have the funds in the hands of the guardian of his wife, the marriage having taken place and the sum being due before the adoption of the Constitution of 1868, or was the wife entitled to the same as a separate estate against the claim of her husband and his assignee?

At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the choses in action of the wife, which became the husband's absolutely upon his reduction of the same into possession, during the coverture, with the right in case the wife die to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to anyone.

It was also competent to the husband having choses in action *jure mariti* to assign the same for value, or as a security to pay his debts, and the assignment availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and reduced it into possession himself. Bell, Husband and Wife, 55, 56; Arrington v. Yarborough, 54 N. C., 72.

Such has ever been the effect of marriage in this State as to the rights and powers of the husband in the choses in action of the wife, legal and equitable. And accordingly, without the concur-

rence of the wife, the husband could receive and grant discharges for any sum or sums of money due her, and the money when received became his, and he had the right to enforce payment of all her choses in action, without the obligation, here as in England, to make a settlement out of her equitable choses. And so, Harris, the husband, on his marriage acquired the perfect right, and J. O'Connor, by assignment, succeeded to the same, to have an account and settlement of any sums due from Carstarphen, the former guardian of the wife, liable only to be defeated by the accident of the husband's death before the death of the wife.

In this case, the chose in action assigned to the plaintiff, J. O'Connor, was due at the time of the marriage, and a suit was brought for its recovery before the adoption of the Constitution of 1868; and the coverture still continuing, the assignee of the husband has still the right to have the proceeds of the claim assigned to him, unless the Constitution operated to divest or take away the husband's right and thus disable him to pass any right by assignment to J. O'Connor.

In *Sutton v. Askew*, 66 N. C., 172, the husband owned land before the passage of the Act of 1867 enlarging the right of dower, so as to include all the lands of which the husband was seized at any time during the coverture, and the question was as to the effect of the act on the rights of alienation by the husband, and it was ruled in this court that the husband might sell and convey the title without being joined by the wife, upon the ground that he had a vested right to sell and convey on his single deed at the marriage, and it was incompetent to the Legislature, by the new dower act, to restrict his right of alienation, or do more than confer an inchoate right on the wife defeasible by a sale and conveyance by the deed of the husband alone.

In *Holliday v. McMillan*, 79 N. C., 315, the marriage occurred before the adoption of the Constitution of 1868, and the father having given his daughter some articles of personal property after its adoption; the property was levied on by creditors of the husband, and it was claimed that, as an incident to marriage, the husband not only had the right to the property of the wife in possession then, but also to all such, including the late gift to his wife, as she might in any manner acquire during her coverture; and it was urged that this right of the husband could not be impaired by the Constitution adopted subsequently to the marriage. The court ruled, reaffirming *Sutton v. Askew*, *supra*, that it was only vested rights of the husband that were secure from impairment by the Constitution and subsequent legislation, and that it was legitimate and no infringement of the proper rights of the husband, to create a separate estate in the wife of all acquisitions of property and

possibilities accruing to her in any manner subsequent to the adoption of the Constitution of 1868.

In *Bruce v. Strickland*, decided at this term (81—267), the marriage took place and the land was acquired before the act restoring the common law right of dower and before the creation of a homestead in land, and the husband, by deed, in 1874, without his wife's being a party thereto, conveyed the tract with a right of redeeming the same within two years, and on a question made, it is ruled that the husband had a vested right to sell his land, free alike from dower or homestead, as provided by the Constitution of 1868, and having exercised that right it is beyond recall.

Adhering to the correctness of the decisions above referred to, and the reasons on which they were founded, we hold that the marriage between Harris and his wife clothed him, or any assignee claiming under him, with the right to have the legal and equitable choses in action of the wife, and that such right, although not absolute so as to exclude survivorship to the wife, was a substantial and vested interest, with no infirmity in it, except as being liable to be defeated on the death of the husband before the wife's death. This right was not a right in a possibility or mere expectancy, but a right fixed and established by law in the husband as an incident to marriage and attaching to a fund due and outstanding in the hands of the guardian, and presently recoverable, with nothing to defeat it, except in the possible survivorship of the wife.

Such being the character of the right of Harris as husband in the fund assigned, his rights could not be taken away and given to the wife, without his consent, by the Constitution of 1868, creating separate estates in *femes covert*.

It is therefore the right of the present plaintiff, O'Connor, to recover and have as assignee of Harris, for the purpose of the trust, so much of the fund in the hands of the guardian, or which was in his hands after notice of the assignment, as will answer the purposes of the assignment, subject, however, to the continuing right of the wife to have the fund if the husband shall die before it is collected.

No error.

Affirmed.

To the same effect is *Morris v. Morris*, 94—613. The Constitution, Art. X, sec. 6, gives the wife all her property as her separate estate. The husband still has the right to administer and take the surplus after payment of her debts. *Revisal*, 4; *Mordecai's Lectures*, pp. 380, 966. By the common law the husband became liable for the wife's debts, but that is changed by statute. *Revisal*, 2101, 2106; 86—136. See *Married Women's Contracts*, *ante*.

3. Assignment by death.

Revisal, 156.—Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate.

157. The following rights of action do not survive: (1) Causes of action for libel or slander, except slander of title; (2) causes of action for false imprisonment and assault and battery; (3) causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death. *Amended, Acts 1915, ch. 38.*

For injuries resulting in death, see *Revisal*, 59, 60; *Bolick v. R. R.*, 138—370.

Revisal, 415, *Clark's Code*, sec. 188, provides that no action shall abate by death, etc., if the cause of action survive; and in case of death, etc., except in suits for penalties, and for damages merely vindictive, on motion the court may allow the action to be continued by or against the representative.

(207) *SILER, Admr., v. GRAY, Admr.*,

86 N. C., 566—1882.

Civil action for breach of contract. L. F. Siler, the defendant's intestate, in consideration of receiving a deed for certain land from J. R. Siler, the plaintiff's intestate, agreed to care for and support J. R. Siler and wife during their lives and allow them to occupy the land with him, and he also agreed to pay to one Moore and Sloan the sum of \$500, each, at the death of said J. R. Siler and wife; upon failure to perform said agreement he was to forfeit and pay to J. R. Siler or his heirs the sum of \$5,000. L. F. Siler performed the contract as to the service as long as he lived, but J. R. Siler and wife survived him several years, and the complaint alleges that no provision was made for them by L. F. Siler or his representatives, and the money was not paid to Moore and Sloan. This action is brought to recover the \$5,000, from the estate of L. F. Siler.

The court held that the plaintiff could not recover of the defendant except for a breach of the contract committed in the lifetime of his intestate. The plaintiff submitted to a nonsuit, and appealed.

RUFFIN, J. There being no evidence offered in support of the breach, alleged to consist in the nonpayment of the sums stipulated to Roxanna E. Moore and Harriet T. Sloan, that part of the case is excluded from our consideration, and the plaintiff's right to recover left to depend upon, as the only matter complained of, the failure of the personal representatives, or heirs at law, of the intestate L. F. Siler, after his death, to contribute to the support of J. R. Siler and his wife—as to which this court fully concurs in the ruling of His Honor in the court below. The general rule unquestionably is, that the personal representatives of a party are

bound to perform all his contracts, whether specially named in them or not, or else make compensation for their nonperformance out of his estate. But to this there is the exception, as well established as the rule itself, of all such contracts as require something to be done by the party himself in person.

In Chitty's Pleading, 19, it is said that no action lies against the executor upon a covenant to be performed by the testator in person, and which consequently the executor can not perform; and again, in Chitty on Contracts, 138, that death, though not in general a revocation of an agreement, may be such when the engagement is a personal one, to be performed by the deceased himself, and requiring personal skill or taste.

In Pollock on Contracts, 367, the principle is thus stated: "All contracts for personal service, which can be performed only during the life of the contracting party, are subject to the implied condition that he shall live to perform them, and should he die, his executor is not liable to an action for the breach of contract occasioned by his death."

In such cases, it is held that the act of God furnishes an excuse sufficient. Accordingly in *Bourt v. Firth*, 4 Court of C. P., 1, a plea to an action on an apprentice bond that the apprentice was prevented by sickness from performing the contract, was ruled to be a valid plea and the defense a good one, the court saying that incapacity, by reason of the intervention of an act of God, to perform personal service, is an excuse for its nonperformance, notwithstanding an absolute and unconditional covenant to render the same; and again in *Farrow v. Wilson*, reported in the same volume, at page 744, it was held that where one party covenanted to serve another as farm bailiff, the death of either party dissolved the contract—such being an implied condition, it was said, in every contract for personal services—and the same doctrine has been recognized in *Robinson v. Davidson*, 6 Court of Exchequer, 268; *Taylor v. Caldwell*, 113 E. C. L. Rep., 826; *Dickey v. Linscott*, 20 Me., 453.

Assuming such to be the law, under which does the case at bar fall—the general rule, or the exception as stated? This must depend upon the intention of the parties, for at last, it is in every case purely a question as to their intention.

It is true that the cases put down in the books, like those cited by us, are generally those in which the contracts sued on have been to marry—to teach an apprentice—to render services as an author, or as a doctor or a lawyer—such as will be determined by the very nature of the services to be rendered or the skill requisite to perform them, to the exclusion of all thought of performance by any other person than the contracting party.

But still this is so, even in contracts of that nature, because the law implies such to have been the intention of the parties, and for that reason, and that alone, construes them to be personal contracts, and takes them out of the general rule.

Now if such be the consequence of an implied intention of the parties, how much more should it follow in the case of a contract, in which they have clearly manifested a purpose to treat their contract as personal, and the very circumstances surrounding them forbid that any other construction should be put upon it?

Here, the contract on the part of the defendant's intestate was that he would administer to the comfort of his father and mother during their lives, and would see that they were provided for; and further, that he would jointly occupy with them their home, and he and his family become members of their family; thus, every feature of it depending upon the relation which he, as a near kinsman, bore to them, and upon the confidence which they reposed in him personally.

It is to be observed, moreover, that the contract was an entire one, to be performed by the administrator in whole or not at all. If bound to maintain them, and see to their comfort, he must needs have had the correlative right to demand admittance, stranger though he might have been, into their home, that he might become an inmate thereof.

If in the lifetime of all the parties the defendant's intestate had sought to introduce a stranger into the family, and through his agency to have performed the services stipulated to be rendered by himself, can it be supposed that the law would, for one moment, have tolerated such a course? and if not, then should the law, after his death, furnish a substitute for him, in his administrator, when he, himself, could not appoint one? We think not; and for the reason that the parties to the contract, manifestly, never contemplated or intended that there should be one.

Our conclusion, therefore, is that so much of said agreement as imposed upon the defendant's intestate the duty of providing for the plaintiff's intestate and his wife, and of looking after their comfort, was purely personal in its nature, and inasmuch as the defendant could not have enforced his right to perform, so neither is he liable to an action for not having done so.

There is no error, and the judgment of the court below is

Affirmed.

General rule.—"It has been established from the earliest history of the law, that as to all personal claims, such as are founded upon any obligation, contract, debt or other duty, upon which a testator might have been sued in his lifetime, the right of action survives his death, and is enforceable against his executors." 95—p. 231, citing 2 Williams on Executors, sec. 1557.

Under a contract for employment for a specified time, the employee may

recover from the personal representative as such for the whole term, though part of the service was rendered after the employer's death. *Pugh v. Baker*, 127—2; 8 Am. & Eng. Encyc., 1008. In *Shuler v. Millsaps*, 71—297, it was held that a cause of action for breach of promise of marriage survived against the administrator, and this was sustained in *Allen v. Baker*, 86—91, though with some doubt; and this seems to be in conflict with the principal case and the general authorities. Action for deceit in the sale of a chattel survives, 4—143. A judgment survives, as other debts; but a judgment in favor of a dead person is irregular, while one against a dead person is voidable, 107—52; 99—51; 100—267. A purchase at a sale under execution issued before the debtor's death, but sold after, is valid, 107—705.

Action for assault in putting one off the train does not survive, but it might survive as a breach of contract to carry him as a passenger, 63—238; 87—351; so with action for mental anguish in telegraph case, 130—299. Cause of action for personal injury not resulting in death, does not survive, while for injury causing death the administrator may sue, 123—118; 138—370, as he may for injury to property, 140—533. The action does not abate in the latter case by the death of defendant, 61—356.

Warrant for pension issued after the death of the pensioner must be returned, 130—638. Unused mileage book goes to the administrator, and the railroad is not bound to transport the dead body of the purchaser on it, 135—342. Action for penalty abates, 139—297.

The remedy of the creditor is through the personal representative, 118—518, and action must be by the personal representative, 76—377; 129—30. Personal representative may foreclose a mortgage by sale, but could not maintain an action for foreclosure. 132—50, but he can do so now. Revisal, 1031.

Heirs of vendor and vendee in contract for sale of land, when parties. 100—267; Code, 1492; Revisal, 83. Surviving partner is proper person to enforce and be subject to firm contracts. 114—22; 114—13; 116—806; 125—503; 128—110; 129—247; 139—448; Revisal, 2540-2547.

For history of legislation in regard to abatement of actions, see *Tate v. Morehead*, 65—681. For numerous cases on the subject, see 23 L. R. A., 707, and note; *Brown v. Fairhall*, 213 Mass., 290, 100 N. E., 556, 45 L. R. A. (N. S.), 349; *Stone v. Bayley*, 134 Pac., 120, 48 L. R. A. (N. S.), 429 (support of child); *Wilson v. Hinman*, 182 N. Y., 408, 75 N. E., 236, 2 L. R. A. (N. S.), 232 (alimony); *Hawkins v. Ball*, 18 B. Mon., 816, 68 A. D., 755.

CHAPTER III.

JOINT OBLIGATIONS.

Sec. 1. Joint promisors.

(208) GRIER v. FLETCHER,

23 N. C., 417—1841.

RUFFIN, C. J. This is an action of covenant, brought against Nathan Fletcher, Elizabeth Fletcher, John Fletcher, and Jacob Rhodes, for the breach of a covenant of general warranty, contained in a deed of bargain and sale, made by them to the plaintiff. The defendants pleaded in abatement the nonjoinder of James Fletcher, Elizabeth Rhodes, wife of the defendant Jacob, and John Pack and his wife, Mary Pack, by whom also the deed was executed jointly with the defendants; and to this plea, the plaintiff demurred generally. . . .

His Honor was of opinion that the case was not within the Revised Statutes, c. 31, s. 89, which authorizes "in all cases of joint obligations or assumptions of copartners or others, suits to be brought against the whole or any one or more of the persons making such obligations, assumptions, or agreements;" but that suit must be brought against all the covenantors, or against a single one only. The plea was therefore sustained, and a judgment given thereon for the defendants, from which the plaintiff appealed.

As the covenant is, according to its terms, joint and not joint and several, it would at common law have been necessary to sue all the parties, or all those living. It is, however, admitted by His Honor, and properly, as we think, that several actions would lie against each of the covenantors. This could only be by force of the Act of 1789, c. 314, in the fourth section of which it is provided, first, that a joint debt or contract shall survive against the heir or the executor of a deceased obligor; and secondly, that on joint obligations or assumptions of copartners or others, suits may be brought in the same manner as if such obligations or assumptions were joint and several. It is true, that under the latter branch of that act, an action would only lie against one or all of the joint contractors, and not against any intermediate number of them. But it was corrected by the Act of 1797, c. 475, s. 2, which forms the 89th section of chap. 31, of Revised Statutes, before quoted. That not only uses the words "obligations and

assumptions," found in the Act of 1789, but adds the broader term "agreements;" and provides that suits may be brought "against the whole or any one or more of such persons making such," that is, *joint* "obligations, assumptions or agreements." It is thus quite apparent that this case is within the letter of the statute. Being so, the act must, we think, govern it. In interpreting it, we can not stop short of the meaning, which is plainly imported by the language of the act. On the contrary, the Acts of '89 and '97 have been looked on as being of the nature of statutes for the amendments of the law, and been construed with the liberality to which remedial statutes are entitled. Thus, in *Smith v. Fagan*, 13 N. C., 298, it was, in accordance with the previous decisions there cited, held, that a judgment, upon the death of one of the defendants, survived, not only against the other defendants, but also against the executor of him who died, and might be proceeded on against them all jointly. So, if one of these covenantors had died, the same principle would authorize a joint suit against the survivors, and the executor or heir of the dead one. It is for the benefit of the creditor and the surviving debtors that it should be so, and, indeed, for the representatives of the deceased party also; since it is well to charge, at once and together, all those who may be ultimately charged, and without the necessity of incurring the expense of separate actions. Now if the case thus fall within that branch of the act, which authorizes a joint action, where one of the obligors or covenantors is dead, it would seem it must fall also within the other, which allows an action against any one or more of the persons making "a joint agreement," omitting some of the parties. There is nothing in the nature of the thing or in the objects of the acts, which would confine their operation to contracts for the payment of money merely. Agreements, generally, are mentioned, and there have been numberless actions, like this, brought on bonds with collateral conditions, or on joint covenants for the performance of specific things, other than the payment of money. If any covenant be within the acts, all must be; one being as much an agreement as another. If persons owning land jointly or, in common, do not mean to be liable for each other, they need not be; as they may make several conveyances, or in the same deed may covenant severally, each one for himself and for his share. The judgment must be reversed, the demurrer sustained, and judgment of *respondeat ouster*.

Per Curiam.

Judgment accordingly.

(209) RUFTY v. CLAYWELL, *et al.*,

93 N. C., 306—1885.

Civil action on a note given by the firm of Claywell, Powell & Co. Process was issued against all three of the defendants, and was served on two, but not on the defendant, Claywell, and judgment was rendered by consent against the two defendants for \$687. About two years later the plaintiff sued out a summons under sec. 223 of The Code, against Claywell, to appear at next term, and show cause why the judgment rendered against the other partners should not be made absolute and bind him individually. The defendant denied that he was a partner, and set up the statute of limitations as a defense. His Honor was of opinion that the statute ran in favor of the defendant from the date of the note, notwithstanding the former action and judgment, and instructed the jury to return a verdict for defendant. The plaintiff appealed.

SMITH, C. J. The sole question presented in the appeal is whether the running of the statute was arrested as to all the partners by the institution of the original action, or continued for the protection of the appellee, because not prosecuted by the issue of an alias summons against him.

The preceding section of The Code makes separate provisions for the prosecution of actions on liabilities that are joint, and liabilities that are several; and it is to the former that the four following sections apply. Under the rules of pleading, according to our former system, if the action was upon a joint contract and the plaintiff took judgment against a part only of those liable, there could be no recovery in a subsequent suit against those omitted, for the reason that the contract was merged in the judgment, while not being parties to the judgment, they were not bound by its rendition.

It was otherwise as to contracts that created a several liability, and to such, as in case of torts, a judgment against one or more, left their separate liabilities in force, and them exposed to a subsequent action in like manner as if no judgment had been rendered against the others.

To obviate the legal consequences of a judgment against some of the joint obligors in extinguishing, through the merger, the cause of action against the others, is the manifest purpose of this innovating legislation introduced in the new system of pleading and practice. Such is the view taken by Mr. Freeman in his work on Judgments, and in our opinion it is a correct view. Secs. 231, 233, 234.

In this State, contracts whether made by copartners or other joint obligors, were made several by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against the others afterwards. Rev. Code, ch. 31, sec. 84. This enactment was not introduced in C. C. P., and hence, the principle governing contracts as construed at common law being restored, the necessity arose of providing the remedy contained in The Code. The omitted section, which in *Merwin v. Ballard*, 65 N. C., 168, was decided to have been repealed, was enacted at the session of the General Assembly of 1871-72, ch. 24, sec. 1, and now constitutes sec. 187 of The Code.

The result is to render contracts joint in form, several in legal effect, and to neutralize, if not displace, those provisions which operate only upon contracts that are joint, and pursuant to which the present proceeding is conducted.

That the contract possesses the twofold quality of being joint as well as several in law, can not render available provisions which, in terms, are applicable to such as are joint only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the courts of New York. *Stannard v. Mattin*, 7 How. Pr., 4; *Lakey v. Kingan*, 13 Abb. Pr., 192.

We are then constrained to regard the issue of the summons against the appellee as the beginning of a new suit, and the action is open to every defense which could be set up if there had been no previous recovery of the other partners.

If sec. 224 is so construed as to cut off any defense which the appellee might have, and, when he has had no day in court and no notice of the suit against his associate partners, subject his individual property to the payment of the firm debt, it would be, to say the least, a harsh measure, which we should be reluctant to attribute to the Legislature as an intended result, without a very clear declaration of such intent in the statute. It permits, in cases where the proceeding may be authorized, the setting up any defense that may have arisen thereto, "subsequently to such judgment," and literally, such would be the statutory bar that since became, and was not when that action began, a defense. But it is not necessary to pass upon this point.

There is no error, and the judgment must be affirmed.

See also *Davis v. Sanderlin*, 119—84; *Koonce v. Pelletier*, 115—233.

At common law joint contracts rendered each one liable for the whole debt, but they were jointly liable and all had to be sued; in case of death the liability rested upon the survivor; and a release of one by the obligee released all. The joint obligees were entitled jointly, all had to join in the

suit, and there was survivorship. In several contracts, the liability was separate, and they could not be sued jointly; and the several obligees had to sue separately. In joint and several contracts, the obligee could sue all jointly, or each one separately, but not otherwise. *Brown v. Clary*, 2—107; *Williamson v. Chiles*, 27—244; 6 R. C. L., 879, 880; *Clark Cont.*, 379, 383, 384.

By statutory changes all joint contracts are now joint or several. *Revisal*, 413, 455-458; *Clark's Code*, secs. 187, 222-225. As to several contracts, *Revisal*, 412; *Clark's Code*, sec. 186. On joint contracts, see also 23—389, 32—55, 32—195, 112—253. The joint liability of common carrier, lessor and lessee. *Carleton v. R. R.*, 143—43.

Sec. 2. Joint promisees.

(210) *RICHARDSON et al. v. JONES et al.*,

23 N. C., 296—1840.

DANIEL, J. This was an action for debt on a specialty; plea, *non est factum*. The plaintiffs declared on a bond dated, on the 16th of April, 1823, for the sum of £3,500, made and executed to William Richardson and John Wall, as obligees. In the trial, the plaintiffs, to support their declaration, offered in evidence a bond for the same sum and date, but executed by the defendants to the said William Richardson and John Wall, Esqrs., "and the rest of the justices assigned to keep the peace for Rutherford County," "to be paid to the said William Richardson and John Wall." The reading of this bond in evidence was objected to, as it appeared to be a bond to more joint obligees, than the one declared on professed to be. The court rejected the evidence; and the plaintiffs were nonsuited and appealed.

If the obligors, on a breach of the bond, had paid to Richardson and Wall, it would have been a good satisfaction and discharge. But if the obligors failed to pay as it is alleged they did, then the instrument offered in evidence informs us that the obligors have contracted, under their seal, with several other obligees besides Richardson and Wall. Those other obligees are not made parties plaintiffs in the declaration; nor is there any averment in the declaration that they are dead, so as to enable Richardson and Wall to sue as survivors. In actions *ex contractu*, the omission to join as plaintiffs in the writ and declaration of all those that ought to be joined (*viz.*, all the obligees who are alive), may be taken advantage of on the trial under the general issue. The contract and obligation were made to others besides Richardson and Wall. The words in the contract "to be paid to the said Richardson and Wall," do not restrict the legal force of the deed to those two only; but as the contract is made jointly with all the named obligees, all must join as plaintiffs in the action. The plaintiffs could have averred in their declaration, who were justices at the date of the bond and have made them parties plaintiffs. And

they could, and ought to have averred the death of any of the obligees, if any had died since the date of the bond, to enable the survivors to sue and maintain the action. The bond offered in evidence was a different one from that described in the declaration, and it was properly rejected by the court. The judgment must be affirmed.

Per Curiam.

Judgment below affirmed.

An action against one of two or more joint obligors might be defeated at common law by a plea in abatement; changed now so as to make joint obligors "joint or several." An action by one of two or more joint obligees was fatally defective. *Von Glahn v. Harris*, 73—p. 332. It is a general rule that in all suits relating to partnerships all the partners are necessary parties, either plaintiffs or defendant. *Heaton v. Wilson*, 123—398. Surviving partner has the right to sue and settle all partnership affairs. *Revisal*, 2540, *et seq.*

For regulation as to parties under the present practice, see *Revisal*, 409, 410; *Clark's Code*, secs. 183, 239 (4); *Stewart v. Price*, 64 Kan., 191, 64 L. R. A., 581.

Sec. 3. Release of one party.

(211) SCOTT v. HARRIS,

76 N. C., 205—1877.

Civil action on a note. The defendants, sureties, resisted the payment on the ground that the plaintiff, for a valuable consideration, had agreed with the principal to forbear collection for a specified time; that they had no knowledge of such agreement, and that the plaintiff's rights against them were not reserved. There was a verdict and judgment for defendants, and plaintiff appealed.

READE, J. There is sympathy for a child who in reaching too far for a flower falls over the brink and is lost; but a creditor who clutches eighteen percent from the principal debtor under a contract for indulgence until he goes into bankruptcy and then reaches further to collect the principal money out of the sureties, deserves a fall.

As soon as a debt is due and payable, if the principal debtor does not pay it, the surety may pay it and immediately sue the principal for money paid to his use. If, therefore, the creditor agrees with the principal debtor in such a manner as that he is bound by the agreement to postpone the day of payment, he puts it out of the power of the surety to pay the debt and sue the principal, and he thereby puts the surety in jeopardy. And the surety being no party to the new contract for indulgence is discharged from all liability.

The facts in this case show the propriety of that rule.

At the maturity of the bond the principal debtor offered to pay it; but the creditor offered to forbear the collection of the bond for twelve months if the debtor would pay him in advance one and a half percent a month for the whole time. And the debtor agreed to it and gave his separate note for the amount, to be paid in goods, some of which were paid. The sureties knew nothing of this and supposed the debt was paid until some time afterwards and before the time of forbearance had expired, when the principal debtor went into bankruptcy and they learned the debt had not been paid.

Admitting the rule to be as stated, still the plaintiff insists that the sureties are not discharged because his agreement with the principal debtor was not a valid contract, and therefore he was not bound by it, in this: that the exacting of one and one-half percent a month was usurious and invalid. It is not for the creditor to say that. His conscience takes fright at a danger which may never approach him. The debtor may plead usury or not at his pleasure, and unless and until he does so the note which was given for the usury is valid, and a part of it has already been paid in goods. The contract was sufficient to prevent the sureties from paying the debt and suing the principal. And that is the wrong of which they have a right to complain.

But again, the plaintiff insists, that admitting that he did agree to forbear collecting the debt out of the principal debtor, yet he reserved the right to collect it out of the sureties; and that, therefore, they were not delayed, for they might have paid the debt and sued the principal, although he could not.

The jury have found that the plaintiff did not expressly reserve that right. And then the plaintiff, as a last resort, says that although he did not expressly reserve the right, yet he reserved it "in his mind."

If such a pretense be not too puerile to notice at all, it is sufficient to say, that the contract with the principal debtor was what passed between them, and not what was "reserved in his own mind."

Per Curiam.

No error—Judgment affirmed.

If A and B execute a joint and several note, a judgment against A is no bar to an action against B on the same note, but a satisfaction of the debt by A would be a discharge to B, and a partial satisfaction is a discharge *pro tanto*. Hix v. Davis, 68—231; Bank v. Lumber Co., 123—24. See Bank v. Lineberger, 83—454.

(212) SMITH v. RICHARDS,

129 N. C., 267, 40 S. E., 5—1901.

Civil action, in which there was a judgment for the defendants, and the plaintiff appealed.

FURCHES, C. J. This is an action against several defendants upon a former judgment for seven hundred and odd dollars—being the amount of costs in an action against the plaintiff, in which these defendants (plaintiffs in that action) had failed, and judgment was entered against them and in favor of the plaintiff in this action. Since the rendition of said judgment, two of the defendants have paid the plaintiff their *aliquot* parts, and the plaintiff gave them separate receipts therefor, as follows: “Received of W. S. Richards ninety-two 94-100 dollars, for one-sixth the costs in a judgment rendered in the case of J. B. Richards *et al.* v. J. B. Smith, at Spring Term of the Superior Court, March, 1889. This is to release W. S. Richards in full of the costs of suit above mentioned. This 28th day of December, 1896. (Signed) John B. Smith.” The other receipt, to Fannie Rutledge and husband, J. L. Rutledge, is the same in substance as the above.

All the parties against whom judgment was rendered in the former action are made defendants in this action; and the defendants, W. S. Richards and Fannie Rutledge, and her husband, J. L. Rutledge, did not plead. But the other defendants answered and set up the above-mentioned receipt as a release and discharge of them from any liability on said judgment. This presents the only question in the case.

It seems that, originally, contribution between co-obligors was held to rest upon a moral obligation only, and courts of equity alone could enforce it. *Moore v. Isley*, 22 N. C., 372. But, at a later date, courts of law in many jurisdictions considered it a joint obligation in the nature of a contract, and actions at law were sustained when they were to recover only an *aliquot* part. *Parsons on Cont.* (3 Ed.), 34 and 35. But where more than this was demanded on account of insolvency, or for other cause, it still remained a matter for the courts of equity, as courts of law could not adjust equities between the parties. But it seems probable the courts of law in this State still declined to take jurisdiction of matters of contribution, as we find that in 1807 the Legislature passed an act authorizing co-sureties to bring actions on the case in *assumpsit* for contribution. *Sherrod v. Woodard*, 15 N. C., 360, 25 Am. Dec., 714; sec. 2094 of The Code. But this act only applied to *co-sureties*, and, it would seem, left the law as to *co-*

principals as before its passage. And whether this remained so or not, under the divided jurisdiction, it is now so under the Constitution of 1868 and The Code. *Russell v. Adderton*, 64 N. C., 417; *Dudley v. Bland*, 83 N. C., 220; *Craven v. Freeman*, 82 N. C., 361. The rights of the parties may now be administered, whether legal or equitable in their nature. *Russell v. Adderton* and *Dudley v. Bland*, *supra*. And the rights of the defendants, as between themselves, may be adjusted and settled in an action against them. *Parrish v. Graham*, at this term (129 N. C., 230).

This is not an action for contribution; that right does not arise at law or in equity until the obligor has paid the money. And none has been paid in this case by either of the defendants who are contesting the plaintiff's right to recover. But the doctrine of contribution is involved, and it was necessary to consider it in determining the rights of the parties.

The defendants contend that the payments of W. S. Richards and Rutledge and wife, and their discharge, was a discharge of them. It was admitted by defendant that the "receipt" was not a release, as it was not under seal. But it was ingeniously argued that the reason that a partial payment and receipt, stating that it was in full, were not a discharge, was because there was no consideration to support it beyond the amount paid; and that it was *nudum pactum* for all above the amount paid; whereas, a similar receipt under seal would be a discharge, because the seal imported a consideration. And it was argued that the Act of 1874-5 (sec. 574, of The Code), supplied the consideration, and a receipt now for a part was as effective as if it was under seal. This is so in cases where the statute applies, but it seems to have no application to this case.

The receipt does not seem to have been intended as a *compromise* of the *whole*, nor of *any part of the debt*. It was a payment in full of the defendants' *aliquot* parts of the judgment, and a discharge of the parties paying it *from any* further liability. And as these defendants are discharged from *paying anything more*, it is a discharge of the other four defendants from any liability beyond their *aliquot* parts—one-sixth each. For, as plaintiff could recover nothing more out of W. S. Richards and Rutledge and wife, these four defendants could recover nothing more out of them, as their rights depend upon the rights of the plaintiff, Smith, and their right of subrogation.

We do not feel called upon to enter into a further discussion of the principles governing this case, as they have been so fully discussed in *Russell v. Adderton* and *Craven v. Freeman*, *supra*, and especially in *Dudley v. Bland*, *supra*.

It therefore follows that the plaintiff, Smith, is not entitled to

judgment *in solido* against all the defendants; nor is he entitled to such judgment for the unpaid balance against the four defendants who have paid him nothing on his former judgment; but that he is entitled to a judgment or *decree* against them separately for their *aliquot* parts, that is, against John Richards for one-sixth, Sarah Summerrow and her husband, H. M. Summerrow, for one-sixth, Elizabeth Jenkins and husband, for one-sixth, and George Richards for one-sixth. No right of contribution exists between them upon said judgment, nor is either of these defendants liable to the plaintiff for anything more than his judgment for the said one-sixth of the original debt.

There is error, and the judgment should be entered as above indicated. Error.

If the creditor make any change in the relations of the surety so as to affect his rights, as by release, parting with securities, or a valid contract to forbear collection against the principal without the knowledge of the surety and without reserving his rights against the surety, the latter is discharged, either *pro tanto* or entirely. In addition to the cases cited in the cases above, see *Cooper v. Wilcox*, 22—90; *Stirewalt v. Martin*, 84—4; *Bank v. Linelberger*, 83—454; *Carter v. Duncan*, 84—677; *Forbes v. Sheppard*, 98—111; *Hollingsworth v. Tomlinson*, 108—245; *Scott v. Fisher*, 110—311; *Bell v. Howerton*, 111—69; *Chemical Co. v. Pegram*, 112—614; *Hinton v. Greenleaf*, 113—6; *Jordan v. Speirs*, 113—344; *Sutton v. Walters*, 118—495; *Bank v. Sumner*, 119—391; *Jenkins v. Daniels*, 125—161; *Smith v. Parker*, 131—471; *Revell v. Thrash*, 132—803; *Draughan v. Bunting*, 31—10; mere forbearance to sue does not release. 40—91.

A covenant not to sue one of two joint debtors does not discharge the other, while a release would discharge. *Winston v. Dalby*, 64—299; but it would discharge a surety. *Evans v. Raper*, 74—639.

The defense on account of extension of time may be waived in the note. *Bank v. Couch*, 118—436; and even by a married woman. *Fitts v. Grocery Co.*, 144—463.

As to discharge of surety generally, see 27 Am. & Eng. Encyc., 489 *et seq.*; 34 Cyc., 1081.

The right of surety to contribution, see further, *Powell v. Mathis*, 26—83; *Allen v. Wood*, 38—386; *Hall v. Robinson*, 30—56; *Adams v. Hayes*, 120—383; *Comrs. v. Dorsett*, 151—307; the liability is in proportion to the obligations signed by each. *Jones v. Blanton*, 41—115; *Hughes v. Boone*, 81—204; 38—502. When two sureties engage in a common risk, and afterwards one takes an indemnity, it inures to the benefit of both. 15—263; 37—233; but not if taken before. 131—501. The surety may require his principal to exonerate him, and may retain funds of insolvent principal in his hands, even against an assignee for value and without notice. 16—151; 17—31. The assignment of a judgment for the benefit of a surety keeps it alive as to the principal but not as to cosurety. *Jones v. McKinnon*, 87—294; but it seems to apply also as to cosurety in *Peebles v. Gay*, 115—38.

Surety paying the debt has a right to be subrogated to the rights of the creditor, as to any security in his hands. *York v. Landis*, 65—535; see also, 57—212; 93—358; 113—197; 123—168; *Tripp v. Harris*, 154—296.

Some of the rights of the surety are regulated by statute, Revisal, 2840—2848, as the right to show that he is surety, to have the property of the principal first taken, to proceed against the principal, to notify the creditor and have him proceed against the principal or the surety will be released, to have contribution, and to be subrogated to the rights of the creditor of an estate.

CHAPTER IV.

INTERPRETATION AND CONSTRUCTION.

Sec. 1. Evidence of the contract.

1. Oral agreements.

(213) SPRAGINS v. WHITE,
108 N. C., 449, 13 S. E., 171—1891.

Civil action by the plaintiffs to recover the price of certain shoes alleged to have been sold to the defendants. The defendants denied the allegations of the complaint, and alleged that, by special agreement, the plaintiffs promised to sell and deliver to them certain shoes at their place of business within two weeks, which they failed to do; that they were not bound to receive the shoes, and did not do so.

The court directed the attention of the jury to the evidence, and among other things said, "If you should believe this agreement and bargain were made, then you must inquire and determine what was meant and understood by it by the parties making it." The defendant excepted on the ground that "the court erred in leaving the interpretation of the contract to the jury." There was a verdict and judgment for the plaintiffs, and the defendants appealed.

SHEPHERD, J. "Where a contract (says Judge *Gaston* in *Young v. Jeffreys*, 20 N. C., 357), is wholly in writing, and the intention of the framers is by law to be collected from the document itself, then the entire construction of the contract—that is, the ascertainment of the intention of the parties, as well as the effect of that intention, is a pure question of law; and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol (that is, oral), the terms of the agreement are, of course, a matter of fact, and if those terms be obscure, or equivocal or are susceptible to explanation from extrinsic evidence, it is for the jury also to find the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written agreement."

In speaking of oral contracts, *Nash, J.*, remarks in *Festerman v.*

Parker, 32 N. C., 474, that "if there be no dispute as to the terms and they be precise and explicit, it is for the court to declare their effect." See also Rhodes v. Chesson, 44 N. C., 336; Pendleton v. Jones, 82 N. C., 249.

"Unless this were so (says *Park*, B., in *Neilson v. Hartford*, 8 M. & W., 806), there would be no certainty in the law; for a misconstruction by the jury can not be set right at all effectually." We are sure that the learned judge was entirely familiar with the above principles, but we think that they are not properly applied in the present case.

The terms of an oral contract must necessarily be ascertained from the testimony of the witnesses, and it is the duty of the court to instruct the jury as to the law applicable to the various phases arising upon such testimony. But where the court presents to the jury a particular view of the facts, and this embodies the terms of a contract which are in themselves precise and explicit, the court should declare their legal effect, and it would be error to leave this to be determined by the jury. In such a case the rule is the same as if the contract were in writing. After charging the jury upon the testimony of the plaintiffs, His Honor presented the contention of the defendants, which was founded upon the evidence of one of their number, as follows: "I agreed to buy of him [the agent of the plaintiffs] a bill of shoes upon his promise to have them in Aulander in two weeks." According to the defense this was the entire agreement as to the shipment and delivery, and it is not varied in any manner because it induced the defendant to purchase the goods. It was the contract resulting from the "express bargain and agreement" that formed the inducement, and it is this contract alone that was to be interpreted. The language used is clear and precise. It is not unusual or equivocal; nor does it involve any scientific exposition by experts, nor is it doubtful in any sense that it may be explained by evidence of usage or other extraneous circumstances. If the language, being thus free from ambiguity, leaves the meaning of the parties in doubt, it is the duty of the court, and not the jury, to determine its legal effect; and if no definite meaning can be attached to such language, then it is the duty of the court to so hold. *Silverthorn v. Fowle*, 49 N. C., 362. His Honor, after stating the terms of the contract, instructed the jury that if such was the contract, they must further inquire and determine what was meant and understood by it by the parties making it. Now the charge assumes that the terms of the contract are ascertained, but at the same time leaves its interpretation to the jury. The court should have interpreted this meaning according to the terms of the assumed contract and not according to

absent terms incorporated into the same by what the jury were to infer was the meaning of the parties. In this we think there was
Error.

Merrimon, C. J., files a dissenting opinion.

See also 68—p. 140; 20—297; 24—170; 66—596; 82—249; 140—52. *Young v. Jeffreys*, 20—357.

2. Written agreements.

1. AS TO THE EXECUTION OF THE INSTRUMENT.

(214) JONES v. BLOUNT,

2 N. C., 238—1795.

Action of debt upon a bond for five hundred and twenty-six pounds. Defendant pleaded setoff, and produced two old bonds, one dated in 1760, and the other in 1768, both attested; the attesting witness to one of them was dead, and defendant was unable to prove her handwriting. The plaintiff objected to proof of the handwriting of the obligor.

Per Curiam, Williams and Haywood. The law only requires the best evidence the party has in his power. The subscribing witness must be produced when there is one; if he is dead, proof of his handwriting may be admitted; and if the handwriting of the witness can not be proven, then proof of the handwriting of the obligor may be received; this affording strong evidence that the obligor meant to make himself chargeable by that signature. And the defendant in the present case was permitted to prove the handwriting of the obligor.

The above is the rule of the attesting witness. For other cases, see *Blackwell v. Lane*, 20—245; *McKinder v. Littlejohn*, 23—66; *Carrier v. Hampton*, 33—307; *Davis v. Higgins*, 91—382; *Howell v. Ray*, 92—510; *Angier v. Howard*, 94—27; *Bright v. Marcom*, 121—86. Revisal, 1604, provides, "It shall not be necessary to prove by the attesting witness instruments to the validity of which the attestation is not required, and such instruments may be proved by admission or otherwise as if there had been no attesting witness; Provided, that this section shall not affect the method and manner of proving instruments for registration." *Lockhart's Handbook of Ev.*, sec. 79.

(215) LUTZ v. THOMPSON,

87 N. C., 334—1882.

Civil action begun before a justice of the peace, carried by appeal to the Superior Court, and thence to the Supreme Court upon exception for the exclusion of certain evidence offered by the defendant.

The action was brought on a bond for \$16.11, given by the defendant to the *feme* plaintiff, expressed to be for "real estate."

The defendant admitted the execution of the bond, but offered in evidence another paper purporting to be a general scheme for the settlement of an estate in which the *feme* plaintiff, the wife of the defendant, and others were interested, and proposed to show that the bond and the other paper were executed as a part of one transaction, and that they were not to have effect until the last paper was signed by all the parties; that some of the parties had refused to sign the paper, and the agreement was never completed. The court excluded the evidence; there was a verdict and judgment for the plaintiffs, and defendant appealed.

RUFFIN, J. In the opinion of this court, the evidence of the defendant was improperly excluded. Not that he could by parol annex to his bond a condition which upon its face it did not bear, or avail himself, in the present state of the pleadings, of a failure in the consideration; but upon the ground that the evidence tended to show that the contract, of which the bond sued on constitutes only a part, is still incomplete; or rather to establish the fact that, instead of a contract, the stipulations between the parties amounted only to a proposed contract, which has never acquired the force of an agreement, and consequently can not be enforced as a whole, because of the subsequent dissent of the necessary parties.

Taking the testimony to be true, it is plain that the parol agreement made by the plaintiff in July, 1876, and the bond then given by the defendant, were but parts of a general scheme for the settlement of their ancestor's estate, and were never intended or expected by the parties to stand as separate and independent transactions; and it would be evidently unjust to enforce one part of that scheme and leave other parts unfulfilled. See *Bell v. Bowers*, 4 Coldwell (Tenn.), 311. . . . *Venire de novo*.

(216) PRATT v. CHAFFIN,

136 N. C., 350, 48 S. E., 768—1904.

Action by plaintiff for goods sold and delivered under a printed order signed by the defendant for the firm of which he was a member. The court allowed the defendant to prove that the order was given with the understanding that it was not to be in effect unless approved by the other member of the firm, and he did not approve it. There was a judgment for the defendant and plaintiff appealed. Affirmed.

CONNOR, J. The exception of the plaintiffs is based upon the theory that the testimony in regard to the agreement, made prior to the signing of the order by the defendant Chaffin, tended to contradict or add to the terms of the contract. This is a miscon-

ception of the purpose and effect of the testimony. The defendants admitted that the order for the goods was signed as alleged and that it was delivered to the agent of plaintiffs, but say that at the time of signing and delivering there was an express agreement that it was not of any binding force or validity unless satisfactory to Hill; that by virtue of this agreement the contract was incomplete, and that the assent of Hill was a condition precedent to the completion of the contract. In this consists the distinction between this case and those cited in the excellent brief of plaintiffs' counsel. This distinction is clearly pointed out in several cases to be found in the Reports. *Shepherd*, C. J., in *Kelly v. Oliver*, 113 N. C., 442, speaking of testimony of this character, says: "This does not contradict the terms of the writing, but amounts to a collateral agreement postponing its legal operation until the happening of the contingency."

Judge *Miller*, in *Ware v. Allen*, 128 U. S., 590, thus states the principle upon which such testimony is admissible: "We are of the opinion that this evidence shows that the contract upon which this suit is brought never went into effect, that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases well recognized in the law by which an instrument, whether delivered to a third person as an escrow or to the obligees in it, is made to depend as to its going into operation upon events to occur or to be ascertained thereafter." *Devens*, J., in *Wilson v. Powers*, 131 Mass., 539, says: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the instrument, but that it never became operative and that its obligation never commenced." *Crompton*, J., in *Pym v. Campbell*, 6 E. & B., 88, says: "If the parties had come to an agreement, though subject to a condition not shown in the agreement, they could not show the condition because the agreement on the face of the writing would have been absolute and could not be varied, but the finding of the jury is that this paper was signed on the terms that it was to be an agreement if *Abernathie* approved of the invention, not otherwise. I know of no rule of law to estop parties from showing that a paper purporting to be a signed agreement was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid or something else done." *Elliott Ev.*, vol. 1, sec. 575. These authorities amply sustain His Honor's ruling admitting the testimony.

The contention made by the plaintiffs that, because of the state-

ment in the order [that it was not subject to countermand], there was no understanding with the salesman, except as printed or written on the order, the defendants are prevented from showing the agreement, assumes the very question in controversy whether there was a valid binding contract. The jury having found in accordance with the defendants' uncontradicted testimony, there was no contract to be varied or added to. It was the misfortune of the plaintiffs that their salesman sent them the order immediately and without informing them of the agreement which he had made with the defendants. This is one of a number of cases before us at this term in which parties have signed long and complicated printed contracts for the purchase of goods, and, in various forms, set up defenses based upon parol agreements with salesmen or agents. It would seem that men of intelligence, both vendors and vendees, would have learned the necessity of reading and understanding the terms and provisions of such contracts before signing and accepting them.

We have adhered to the well-settled principle that in the absence of allegation and proof of fraud or mutual mistake, the solemn contracts of men evidenced by their signature to printed or written agreements can not be varied or changed by parol evidence. *Machine Co. v. Hill*, 136 N. C., 128, and *Register Co. v. Hill*, 136 N. C., 272. These cases come clearly within the distinction pointed out. The instructions asked by the plaintiffs could not have been given. They assumed that a contract had been made and that the defendants were endeavoring to rescind it by countermanding the order. The question of the right to countermand does not arise for the reasons given. There is no error, and the judgment must be affirmed.

For other cases of conditional execution, see *Gwyn v. Patterson*, 72—189; *Barnes v. Lewis*, 73—138; *Bank v. Hunt*, 124—171; *Bank v. Jones*, 147—419; *Bowser v. Tarry*, 156—35; *Garrison v. Machine Co.*, 159—285; *Benton Co. Sav. Bank v. Boddicker*, 105 Iowa, 548, 75 N. W., 632, 45 L. R. A., 321; *Lockhart's Handbook of Ev.*, sec. 125.

2. AS TO THE TERMS OF THE AGREEMENT.

1. *When the writing is not the entire agreement.*

(217) *EVANS v. FREEMAN*,

142 N. C., 61, 54 S. E., 847—1906.

The defendant bought the right to sell an automatic stock-feeder in Hertford County, and gave his note under seal for \$50; the vendor transferred the note to the plaintiff, who sued to collect it; the defendant offered to show that it was the understanding that the note was to be paid out of the proceeds of sales, and

if no sales were made, the note was not to be paid. The court excluded this evidence, and from a judgment for plaintiff the defendant appealed. Reversed.

WALKER, J. The court erred in refusing to admit the testimony of the defendant in regard to the defense as to how the note should be paid. It is very true that when parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or explain it; and this is so, although the particular agreement is not required to be in writing, the reason being that the written memorial is considered to be the best, and therefore is declared to be the only evidence of what the parties have agreed, as they are presumed to have inserted in it all the provisions by which they intended or are willing to be bound. *Terry v. Railroad*, 91 N. C., 236. But this rule applies only when the entire contract has been reduced to writing, for if merely a part has been written, and the other part has been left in parol, it is competent to establish the latter part by oral evidence, provided it does not conflict with what has been written. In *Clark on Contracts*, at p. 85, the principle is thus clearly and concisely stated: "Where a contract does not fall within the statute the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written can not be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract." In such a case there is no violation of the familiar and elementary rule we have before mentioned, because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing.

The competency of such evidence for the purpose of establishing the other and unwritten part of the contract, or even of showing a collateral agreement made contemporaneously with the execution of the writing, has been thoroughly settled by the decisions of this court. Applying the rule we have laid down, it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should in fact be paid, though the instrument is necessarily in writing and the promise it contains is to pay so many dollars. In support of the proposition, as thus stated, we may refer specially to the comparatively recent decisions in *Woodfin v. Sluder*, 61 N. C., 200; *Kerchner v. McRae*, 80 N. C., 219; *Braswell v. Pope*, 82 N. C., 57, and *Pen-*

niman v. Alexander, 111 N. C., 427 (reaffirmed in 115 N. C., 555), which cases seem to be directly in point and to fully answer the objections made by the plaintiff's counsel in his able and skillful argument. Numerous other cases have been decided by this court in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion that such evidence is competent where it does not conflict with the written part of the agreement and tends to supply its complement or to prove some collateral agreement made at the same time. The other terms of the contract may generally thus be shown where it appears that the writing embraces some, but not all of the terms. *Twidy v. Saunderson*, 31 N. C., 5; *Manning v. Jones*, 44 N. C., 368; *Daughtry v. Boothe*, 49 N. C., 87; *Perry v. Hill*, 68 N. C., 417; *Willis v. White*, 73 N. C., 484; *Perry v. Railroad*, *supra*; *Cumming v. Barber*, 99 N. C., 332. The court refused to apply the principle in *Ray v. Blackwell*, 94 N. C., 10, and *Moffitt v. Maness*, 102 N. C., 457, because the oral evidence tended to contradict or vary the written part of the contract and not merely to add other consistent terms. The question was somewhat discussed, with special reference to our own decisions, in *Cobb v. Clegg*, 137 N. C., 153.

The court erred, therefore, in excluding the evidence and in withdrawing this defense from the consideration of the jury. . . .

The cases are numerous illustrating the rule as to parol evidence where the writing does not contain the whole agreement. 44—368; 49—87; 68—417; 80—219; 82—57; 91—236; 92—345; 94—115; 99—332; 100—178; 104—309; 105—198; 118—737; 122—675; 122—721; 130—432; 137—153; *Flynt v. Conrad*, 61—190; the parol part can not contradict the written part. 61—200; *Brown v. Hobbs*, 147—76; *Woodson v. Beck*, 151—144; *Kernodle v. Williams*, 153—475; *Anderson v. Corporation*, 155—131; *Pierce v. Cobb*, 161—304; *Manfg. Co. v. Manfg. Co.*, 161—430; *Wilson v. Scarboro*, 163—380; *Richards v. Hodges*, 164—183; *Palmer v. Lowder*, 167—331; *Faust v. Rohr*, 167—360; *Brown v. Mitchell*, — N. C., —, 84 S. E., 404; *Lockhart's Ev.*, sec. 115.

In *Colgate v. Latta*, 115—127, the plaintiff sued on a written order for 100 boxes of soap at \$3.40 per box, and the defendant was permitted to show an oral agreement that the soap should be shipped in his name, but that another person was to pay for half of it. This case quotes from *Abott's Trial Evidence*, 294, "that where the parties have embodied the terms of their agreement in writing, neither can, in an action between themselves (unless impeaching the instrument), give oral evidence that they did not mean that which the instrument, when properly read, expresses or legally implies, or that they meant something inconsistent therewith," but oral evidence is not excluded, "where the language of the instrument leaves its meaning doubtful, or extrinsic facts in evidence raise a doubt as to its application; or where it appears that the instrument was not intended to be complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement in a matter as to which the instrument is silent, and which is not contrary to its terms nor to their legal effect."

In an action on a note, an endorser was allowed to show that at the time he made the endorsement, it was agreed that if he would execute a deed to certain land he should be released from liability, and that he had executed

the deed. *Smitherman v. Smith*, 20—86. A collateral agreement may be shown by parol. *Typewriter Co. v. Hardware Co.*, 143—97; *Aden v. Doub*, 146—10.

2. *Where the writing is the entire agreement.*

a. Parol evidence can not vary or contradict.

(218) *CLARK v. McMILLAN*,

4 N. C., 244—1815.

The defendant gave the plaintiff a writing, not under seal, whereby he acknowledged that he had sold plaintiff a certain note, for which he had received part payment, and the balance was to be paid when the money was collected. The plaintiff offered to prove by parol, that at the time of the contract, the defendant promised to commence an action against the payees of the note, or one of them, within ten days from the 1st of October, 1806—that, in fact, six months expired before the action was brought. And whether such evidence is admissible, is the question presented to the court.

TAYLOR, C. J. If the tendency of parol evidence is to contradict, vary, or add to a written instrument, it can not be received; if to explain and elucidate it, it may be received. Upon the face of this writing there is nothing doubtful or equivocal. It states a simple transaction, and imposes no obligation upon the defendant; but the object of the evidence is to show that when he made the contract he entered into a stipulation, by which a duty was imposed upon him, for the breach of which this action was probably brought. This is in effect to prove by inferior evidence that that which purports on the face of it to be a memorial of the defendant's contract, is in truth not so. Such evidence is inadmissible according to all of the authorities.

"It is a settled rule of law that when the parties to a contract reduce the same to writing, in the absence of fraud or mutual mistake properly alleged, parol evidence can not be received to contradict, add to, modify or explain it." *Meekins v. Newberry*, 101—17. Where the mortgage fixed the amount of the debt and there was no note, parol evidence could not be used to show a different agreement as to the amount. *Moffitt v. Maness*, 102—457. For further illustration of the rule, see 66—244; 72—213; 98—232; 104—305; *Hall v. Misenheimer*, 137—183; *Koonce v. Russell*, 103—179; *Woodson v. Beck*, 151—144; *Medicine Co. v. Mizell*, 148—384; *Basnight v. Jobbing Co.*, 148—354; *Simpson v. Green*, 160—301; *Bank v. Moore*, 138—529; *Lockhart's Ev.*, sec. 111.

All the papers executed, letters and other writings made and acted upon in the negotiations preceding the contract may be considered in determining what was the agreement of the parties. 29—491; 101—86; 112—115; 115—212.

Parol evidence may be used to show fraud, mistake, etc. 85—17; 92—371; 128—477; *Tyson v. Jones*, 150—181. It may be used to show a subsequent agreement. 119—35; 125—152; *Freeman v. Bell*, 150—146; *Palmer v.*

Lowder, 167—331; *Faust v. Rohr*, 167—360; or when the writings come in question collaterally. 62—241; 116—875; recital as to consideration in a deed may be contradicted. 108—581; 137—240; *Jones v. Jones*, 164—320; for use of parol evidence as to a writing generally, see *Ferguson v. Rafferty*, 128 Pa., 337, 18 Atl., 484, 6 L. R. A., 33, and note; *Lockhart's Ev.*, sec. 112 *et seq.*

b. Explanation of terms.

(219) LONG v. DAVIDSON,

101 N. C., 170, 7 S. E., 758—1888.

Civil action for balance due on account for building a house. The plaintiff alleged that he was to build a brick house for the defendant, at \$2.40 per thousand for laying the brick, to be estimated by "wall count, solid measure." The defendant contended that he was to pay only for actual number of bricks laid. By plaintiff's estimate there were 224,835 bricks, and the defendant owed him a balance of \$163. By defendant's count there were only 155,219 bricks, and he had overpaid plaintiff \$7.53. His Honor submitted the question to the jury to determine from all the evidence what the contract was, and allowed the plaintiff to show what was meant by the words "wall count, solid measure."

Defendant insisted that it was incompetent for plaintiff to offer evidence to explain the terms, and that no custom or usage could be shown "unless the same was reasonable, certain, uniform and universal, and known to the defendant or brought to his knowledge at the time the contract was made, and that the proper mode of counting the brick in the wall was by actual count."

There was a verdict and judgment for the plaintiff, and defendant appealed.

DAVIS, J. Whether the contract was that the bricks were to be laid at \$2.40 per thousand "wall count, solid measure," as insisted by the plaintiff, or whether nothing was said about "wall count, solid measure," and the number of brick was to be ascertained by actual count as insisted by the defendant, and about which there was conflicting evidence, was a question properly left to the jury, and all the exceptions of the defendant, both to the evidence and the charge of the court, may be comprehended in the single question—if the contract was that \$2.40 per thousand, "wall count, solid measure," were to be paid for laying the bricks—is it competent for the plaintiff to show what was meant by those words? Did they have a confined and limited local meaning, unknown to the defendant, and different from the ordinary meaning which the words would import? Or did they have an established, uniform and universal meaning amongst those who use them? Are there two meanings conveyed by the words, one limited and local, and

the other general and universal? "A mere local usage," as was said by *Ruffin*, C. J., in *Jones v. Allen*, 27 N. C., 473, cited by the counsel for the defendant, "in a small part of the country, can not change the law," but if there is an "established, general custom, that would, in truth, be the law."

The question in that case was whether the hirer of the slave (who had employed a physician to attend the slave when sick) or the owner, was liable for the medical bill. There was no evidence of an established, general custom, but the plaintiff, in that case, proposed to show "that in the section of the country where the hiring took place, it was the custom" for the owner to pay for medical attendance; this was not allowed, and the same was held to be law in *Cooper v. Purvis*, 46 N. C., 141.

If the contract was that the building was to be erected of brick at \$2.40 per thousand, "wall count, solid measure," it must be that something was meant by the term used, and there is no conflict in the testimony as to what that meaning was, nor does it appear from the evidence that they had any other meaning. So far from being a local meaning, different from the general meaning, it appears from the evidence that they have one established meaning universally understood among brick-masons and contractors. If the terms are only used in a particular trade or science or calling, the meaning must be gathered from the testimony of persons acquainted with the trade or science or calling in which the terms are employed, and it is for the jury to ascertain the meaning of the terms used; but when the terms of the contract are ascertained, the construction of the contract is a matter for the court. *Silverthorn v. Fowle*, 49 N. C., 362.

It is true that the defendant says that no such contract as is alleged by the plaintiff was made, and "that he knew nothing of any such rule for counting brick as was alleged;" but if the terms of the contract were as alleged by the plaintiff, it was the misfortune of the defendant to have agreed to pay \$2.40 per thousand, "wall count, solid measure," in ignorance of the meaning, and the only meaning, as appears from the testimony, conveyed by the terms used in making of the contract, and without informing himself of the fact that they had, at least, one meaning.

Affirmed.

Parol evidence may be used to explain the terms when the meaning is not clear. "Dollar" explained, 76—360; "less brokerage ten cents per barrel." 112—541; "Cr. by Obs. Sup., \$10." 114—349; *Willis v. Constr. Co.*, 152—100; *Lockhart's Ev.*, sec. 122.

Parol evidence may be used "to fit the description to the thing described"; as in a contract for fifteen walnut trees of a certain description, and there are not more than that number on the land. *Dunkart v. Rineheart*, 89—354; "one tract containing 193 acres, it being the interest in two shares, adjoining the lands of J B. O F. and others." *Farmer v. Batts*, 83—387; *Young v.*

Griffith, 84—715; "Lenoir lands, owned by myself and J W T." Thornburgh v. Masten, 88—293. But not where the description is too indefinite, as in "100 acres" without other designation. Braid v. Munger, 88—297; Radford v. Edwards, 88—347; Ivey v. Cotton Mills, 143—189; Revisal, 948, 1605.

c. Latent and patent ambiguity.

(220) BROWN v. BEBEE,

1 D. Chip., 227, 6 A. D., 728—1814.

This was an action on a promissory note signed by the defendant, in the following words: "For value received, I promise to pay to Jonathan Brown sixteen, on the first day of May next, with interest." The plaintiff offered to prove that the word sixteen meant sixteen dollars; this was excluded and plaintiff appealed.

CHIPMAN, C. J. The rule certainly is, as laid down by the defendant's counsel, that parol proof can not be admitted to explain, extend or vary a written contract. There is but one exception, if it may be called an exception, that is, in the case of a latent ambiguity. As in the case, usually put, of a devise to A; there are two persons by the name of A, father and son; this, appearing by parol proof, introduces an ambiguity as to the person intended by the testator. But, as the ambiguity is not apparent on the face of the devise, it is called a latent ambiguity, and, as it is raised by parol, it may be explained by parol. But where there is a devise of fifty thousand dollars, wholly omitting to name any devisee, this is a patent ambiguity, which can not be explained by parol.

But it is said that this is a mistake, and that mistakes are allowed to be rectified. There are cases in which a court of chancery will correct a mistake, or rather compel the party to correct it, by supplying what was omitted by mistake; but this does not belong to a court of law. But in simple contracts a party is rarely without remedy in a court of law. As, in the present case, the note through an omission being void or ineffectual, the plaintiff may resort to the original contract. He may sue on the original cause of action and recover the demand for which the note was intended to be given. Had the plaintiff in this case added a count applicable to the original contract, he might have recovered what was his just due; he still may have that remedy.

But in this action brought on the note, the County Court were right in rejecting parol evidence to prove what the note should have been, or how it should have been written; the decision is supported equally by precedent and the soundest principles. In an action on a note the plaintiff is entitled by proving only the execution of the note; from the solemnity and certainty of the in-

strument, it affords evidence of the contract, the consideration, and of everything which is necessary to entitle the plaintiff to recover. To give this effect to a note, and yet allow the plaintiff to supply any defect in the note by parol testimony; or, in other words, to prove what the note should have been, as agreed between the parties by parol, is perfectly inconsistent; it would be to give the plaintiff all the benefit of a written contract and yet permit him to prove the contract by parol testimony. Affirmed.

This case states the distinction between the latent and patent ambiguity, but for a different application, see *Williamson v. Smith*, 1 Cold. (Tenn.), 1, 78 A. D., 478; *Marshall v. Haney*, 4 Md., 498, 59 A. D., 92; *Chestnut v. Chestnut*, 104 Va., 539, 52 S. E., 348, 2 L. R. A. (N. S.), 879; *Walker v. Miller*, 139—448, 52 S. E., 125, 1 L. R. A. (N. S.), 157, 111 A. S. R., 805. In *Deaf & Dumb Inst. v. Norwood*, 45—65, the distinction is fully explained in the case of a will. For other cases, see *Twidy v. Saunderson*, 31—5; *Holman v. Whitaker*, 119—113; *Richardson v. Godwin*, 59—229; *Stedman v. Taylor*, 77—134; *Taylor v. Maris*, 90—619; *Ward v. Gay*, 137—397; *Rhyne v. Rhyne*, 151—400; 1 *Greenl. Ev.*, sec. 297; 2 *Am. & Eng. Encyc.*, 288; 17 *Cyc.*, 675; *Wharton v. Eborn*, 88—344; *Silverthorne v. Fowle*, *ante* (35), and note; *Lockhart's Ev.*, sec. 126.

d. Custom or usage.

(221) MOORE v. EASON,

33 N. C., 568—1850.

NASH, J. This action in ejectment is to recover from the defendant a house and lot in the town of Greenville, in the county of Pitt. The demise is laid on the first of January, 1849. The plaintiff claims that the defendant entered into possession of the premises in 1848 as his tenant, and produced evidence tending to prove the fact to be so. In order to show that the tenancy had expired at the date of the demise, set forth in the declaration, he offered to prove that it was the general usage in the town of Greenville for all leases to expire on the day next before the 1st of each January. This evidence was objected to, but was admitted by the court. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

The only question now presented is, as to the admissibility of this testimony, under the circumstances, under which it was offered. We must take the case as it sent to us. There can not be a doubt that parol evidence may be admitted to show a custom or usage of a place where a contract is entered into, for the purpose of annexing incidents to and explaining the meaning of terms used in it. The leading case on the subject is that of *Hutton v. Warren*, 1 *Mason and Welsby*, 466. In that case it was decided that the plaintiff was at liberty to show a custom, by which a tenant, cultivating the premises, according to the course of good husbandry, was entitled on quitting to receive a reasonable allowance

for seed and labor bestowed upon the arable land in the last year of his tenancy, etc. The custom, however, is admissible in proof, not for the purpose of establishing the contract, but to add an incident not expressly embraced in it, and in reference to which the parties are presumed to have contracted. Thus if the lease in the case was made on the 1st of February, 1849, or from the 1st of January, 1849, for and during that year, the plaintiff would be permitted to show, that by the usage or custom of Greenville, all leases made within the town and so terminating, expired on the day preceding the 1st of January. In that case the custom would transport into the contract an incident, upon which it was silent, but with respect to which the parties must be presumed to have contracted. But before the incident can be so engrafted, the contract, as made, must be proved—the incident can not be used to establish the contract. The expiration of a lease is as much a matter of contract as its commencement; nor can the incident be inconsistent with the terms of this contract. In the case of *Wigglesworth v. Dollison*, Douglas, 201, it was decided that a custom, that a tenant, whether by parol or deed, shall have the way-going crop at the expiration of his term, is good, if not repugnant to the lease, by which he holds. See 1st Smith's leading cases, 300, where the case of *Dollison* is also reported, and the notes. The contract of lease in this case may have been for one month, two months, or six months, and whether the custom was applicable or not, would depend upon the term agreed for.

We think that the testimony under the circumstances of this case was improperly admitted, and there must be a *venire de novo*.

Per Curiam. Judgment reversed and *venire de novo* awarded.

The custom or usage of trade may annex an incident to a contract. *Morehead v. Brown*, 51—367; *Chem. Co. v. Atkinson*, 91—389; *Riddick v. Dunn*, 145—31. The custom must be reasonable and general—a mere local usage in a small part of the country can not change the law. *Jones v. Allen*, 27—473; 30—109; *Cooper v. Purvis*, 46—141; *Bank v. Floyd*, 142—187; *Bowman v. Blankenship*, 157—376. But the usage of one in conducting his own business enters into the contract, if known to the other party. *Norris v. Fowler*, 87—9; 65—13; 83—377; 108—407; 124—626; but see 131—111. Custom is not admissible when there is direct evidence that it was not observed. 127—53. Custom can not violate the law. *Winder v. Blake*, 49—332; *Gore v. Lewis*, 109—539 (usury).

"Usage should be definite, uniform, well known and be established by clear and satisfactory evidence, so that it may be justly presumed that parties in making a contract had reference to it." 13 L. R. A., 438, and notes. See also 3 L. R. A., 859; 4 L. R. A., 392; 10 L. R. A., 785; *Penland v. Ingle*, 138—456; *Clark Cont.*, 396; *Mordecai's Lectures*, 612; 2 *Page Cont.*, sec. 604; 12 *Cyc.*, 1030. Usage is an established method of dealing adopted in a particular place or business, and having legal force because people make contracts with reference to it. Custom is used in the same sense as usage, or as the result of usage, having the force of law without the assent of the individual. 29 *Am. & Eng. Encyc.*, 365 *et seq.* As to its use in evidence, see 1 *Greenleaf* (16 Ed.), secs. 294, 295; *Lockhart's Ev.*, sec. 123.

Sec. 2. Construction of the contract.

1. General rules.

GILBERT v. SHINGLE CO.,

167 N. C., 286, 83 S. E., 337—1914.

This was an action by the plaintiffs for the wrongful cutting of timber by the defendant; the defendant claimed under a deed for the timber which conveyed "all oak, poplar, maple, spruce, pine and other timber . . . of the dimensions of 10 inches or more in diameter at a distance of 12 inches from the ground, or which shall attain such size any time within the period of 10 years from the date of this instrument;" and also the right to go over the land "at any and all times during the term of 20 years . . . for the purpose of removing the above mentioned timber." The defendant had cut and removed some of the timber after 10 years and within 20 years from the date of the deed. The court ruled that the deed gave the defendant 20 years to cut and remove the timber, excluded evidence by the plaintiff tending to show what was a reasonable time; and also that the understanding of the parties was that the timber should be cut and removed in the 10 years. The plaintiff submitted to a nonsuit and appealed.

Affirmed.

HOKE, J. It is the accepted rule of construction in this and other written contracts that the intent of the parties, as embodied in the entire instrument, should prevail, and that each and every part shall be given effect, if it can be done by fair and reasonable intendment, and that, in ascertaining this intent, resort should be had, primarily, to the language they have employed, and, where this language expresses plainly, clearly, and distinctly the meaning of the parties, it must be given effect by the courts, and other means of interpretation are not permissible. *McCallum v. McCallum*, 83 S. E., 250 (at the present term); *Kearney v. Vann*, 154 N. C., 311, 70 S. E., 747, Ann. Cas., 1912 A, 1189; *Hendricks v. Furniture Co.*, 156 N. C., 569, 72 S. E., 592; *Bridgers v. Ormond*, 153 N. C., 114, 68 S. E., 973; *Davis v. Frazier*, 150 N. C., 447, 64 S. E., 200; *Walker v. Venters*, 148 N. C., 388, 62 S. E., 510.

Applying the principle, we think it clear that the 10-year limitation, stated in the first portion of the contract, is descriptive as to the size of the timber conveyed and specifying the time within which the measurement must be had.

"Of the dimensions of 10 inches or more in diameter at a dis-

tance 12 inches from the ground or which shall attain such size within the period of 10 years from the date of the instrument."

And the 20-year limitation, in the latter portion, by correct interpretation, is as clearly designed and intended to fix the time within which the timber sold must be cut and removed. True, the instrument here only uses the word "remove," but, considering the extent and purposes of the contract, the term, by clear intentment, includes the right to cut during said period by the usual and ordinary methods of lumbermen in that vicinity. It is the only interpretation which would allow to the term, as used, any reasonable significance, and is the construction approved with us in well-considered cases on the subject. *Lumber Co. v. Smith*, 150 N. C. 253, 63 S. E., 954, followed in *Bateman v. Lumber Co.*, 154 N. C., 248, 70 S. E., 474, 34 L. R. A. (N. S.), 615, and other cases.

This being the correct and clearly expressed import of the contract, His Honor was right in declining to hear testimony as to what would be a reasonable time within which to cut the timber. This question of reasonable time only arises when, as in *Hawkins' Case*, 139 N. C., 160, 51 S. E., 852, the time to commence is left indefinite, "15 years from the time he commenced cutting," and it was held that the grantee was thereby required to commence within a reasonable time. But, in the contract before us, the term refers to the date of the instrument (*Hornthal v. Howcott*, 154 N. C., 228, 70 S. E., 171; *Warren v. Short*, 119 N. C., 39, 25 S. E., 704), and this being definite and certain, the evidence tending to establish a reasonable time was incompetent and properly excluded.

And the court also made correct ruling as to the evidence offered to show that the parties to the agreement only intended to allow 10 years in which to cut and remove the timber. This would be to contradict the written agreement of the parties by parol evidence, and is clearly contrary to authority. Speaking to such evidence in *Walker v. Venters*, the Chief Justice said:

"Such evidence is never admitted, if the wording of the written contract is clear, or if the evidence offered is in direct contradiction of the intrinsic meaning of the language of the contract."

(223) *BANKS v. LUMBER CO.*,

142 N. C., 49, 54 S. E., 844—1906.

Action for breach of contract. The defendant had a conveyance of "all pine lumber of every description at and above the size of twelve inches in diameter at the base when," etc. The plaintiff claims that the defendant has cut timber "less than twelve inches in diameter at the base."

The plaintiff offered to prove a custom in that section to cut

timber two feet from the ground, which was refused. He then offered to prove that defendant had cut timber "less than twelve inches in diameter at about two feet from the ground," which was also excluded. The court intimated that he would instruct the jury that "at the base" meant at the ground, and that plaintiff could not recover for timber cut, measuring twelve inches at the base. Plaintiff submitted to nonsuit, and appealed.

CLARK, C. J. After stating the case: The construction of a written contract, when its terms are unambiguous, is a matter for the court. This contract specifies clearly the diameter and the point of the tree at which the diameter should be measured. In some of the cases which have come before this court, the contract has stipulated "not less than fourteen inches in diameter twenty-four inches above the ground," as in *Lumber Co. v. Hines*, 126 N. C., 225; or "twelve inches in diameter on the stump," *Hardison v. Lumber Co.*, 136 N. C., 173, and *Warren v. Short*, 119 N. C., 39; or "timber that will square one foot," *Whitted v. Smith*, 47 N. C., 36; and it may be that there have been others with a stipulation, like this, for the measurement to be taken "at the base." This is a matter of contract between the parties.

His Honor was correct in holding that "at the base" meant "at the ground." Webster defines "Base—that on which something is supported, as the base of a column, the base of a mountain," *i. e.*, at the foot of the column, at the foot of the mountain. The contract specifies timber "now standing or growing," *i. e.*, trees; and the base of a tree is "at the foot" of the tree. If the parties intended that the measurement should be taken "at the stump" or "twenty-four inches above the ground," they have not so contracted. The contract being for the measurement at the base, it can not be contradicted by parol.

Certainly, evidence that it was merely customary in that section to cut timber two feet above the ground could not have that effect, for it was not shown nor offered to be shown that such cutting was usually under contracts stipulating for measurement "at the base," and that when cut under such contracts the "diameter at the base" was by general custom understood and taken to be twelve inches in diameter two feet above the ground. His Honor, therefore, properly held that "twelve inches in diameter at the base" meant "at the ground." If this enabled the defendant to cut trees that might measure less than twelve inches in diameter two feet above the ground, it is because the plaintiff so contracted.

In *Hardison v. Lumber Co.*, 136 N. C., we held that the natural meaning of the words "twelve inches in diameter" applied to standing trees and would be "from outside to outside, bark included," in absence of a general custom giving the words a dif-

ferent meaning. So, here, the natural meaning of "twelve inches in diameter at the base" is "at the ground," and there was no evidence offered of a general custom that when those words were used in a contract, "at the base" meant "two feet above the ground."

The words "when cut" only extends the time of the measurement, which would otherwise refer to the diameter of the trees at the date of the contract, to the time of the actual cutting. *Hardison v. Lumber Co.*, *supra*, and cases there cited. If the meaning of the contract was "twelve inches diameter at the base of the log" when cut, then all the timber above the lowest cut would belong to the landowner if the upper cuts were less than twelve inches in diameter at the big end. No error.

Interpretation is finding out the true sense of the written words; construction is subjecting the instrument, in its operations, to the established rules of law. 1 *Greenleaf Ev.* (16 Ed.), sec. 277; but this is not generally observed. 17 *Am. & Eng. Encyc.*, 2.

1. Construction must be favorable to the intention, reasonable and agreeable to the common understanding. 2. Where there is no ambiguity, the construction is according to the words; but where the meaning is clear, too great stress must not be laid upon the words; "words are not the principal thing in a deed, but the intent and design of the grantor." 3. The construction is upon the entire deed and not upon disjointed parts. *Lowdermilk v. Bostic*, 98—299; *Cobb v. Hines*, 44—343; *Barnes v. Haybarger*, 53—76; *McNeely v. Carter*, 23—141; *Coal Co. v. Ice Co.*, 134—574; 2 *Page Cont.*, secs. 1112—1116; *Clark Cont.*, 402; *Wilkie v. Ins. Co.*, 146—513; *Railroad v. Railroad*, 147—382, 23 *L. R. A.* (N. S.), 223, 125 *A. S. R.*, 550, 15 *Ann. Cas.*, 363; *Thomas v. Bunch*, 158—175; *Highsmith v. Page*, 158—226; *Beacom v. Amos*, 161—357; *Finger v. Goode*, — N. C., —, 85 *S. E.*, 137; 6 *R. C. L.*, 834 *et seq.* Technical rules are not so much to be consulted as the real meaning of the parties, to be gathered from the instrument itself; sentences may be transposed, and unmeaning words rejected. *Killian v. Harshaw*, 29—497; *Rowland v. Rowland*, 93—214; *Kea v. Robinson*, 40—373; *Foster v. Frost*, 15—424; *Iredell v. Barbee*, 31—250; *Dwiggins v. Shaw*, 28—46; *Ricks v. Pulliam*, 94—225; *Hicks v. Bullock*, 96—164; *Hamilton v. Highlands*, 144—279. Several writings may be construed together. *Howell v. Howell*, 29—241.

Of two constructions, that which upholds the instrument will be adopted, — *ut res magis valeat quam pereat*. *Hunter v. Anthony*, 53—385; 2 *Page Cont.*, sec. 1120. Different parts will be reconciled, if possible; a repugnant clause may be rejected, if the intention is clear. *Proctor v. Pool*, 15—370; *Hawkins v. Lumber Co.*, 139—160; *Jones v. Casualty Co.*, 140—262; *Davis v. Frazier*, 150—447; *Midgett v. Meekins*, 160—42.

General terms may be restricted by particular terms. *Paalzow v. Estate Co.*, 104—437. Words are taken most strongly against the user, except in grants, etc., from the State. *R. R. v. Reid*, 64—155; *Comrs. v. Call*, 123—p. 315. A single bond is construed against the obligor, but a condition, which is doubtful, in his favor. *Bennehan v. Webb*, 28—57. Insurance contracts are construed favorably to the insured. *Kendrick v. Ins. Co.*, 124—315; *Grubbs v. Ins. Co.*, 125—389; *Scull v. Ins. Co.*, 132—33; *Grier v. Ins. Co.*, 132—542; *Rayburn v. Casualty Co.*, 138—379; *Jones v. Casualty Co.*, 140—262; *R. R. v. Casualty Co.*, 145—114. The court can not supply words except in case of merely clerical mistake. *Cadell v. Allen*, 99—542; *Sinclair v. Hicks*, 116—606; *Wiseman v. Green*, 127—288; 17 *Am. & Eng. Encyc.*, 19; *Ipock v. Gaskins*, 161—673.

Words are construed in the ordinary sense, and technical terms in technical sense; unless affected by the circumstances or usage. *Read v. Granberry*, 30—109; *Mining Co. v. Smelting Co.*, 122—542; 2 *Page Cont.*, sec. 1104—1111; 3 *L. R. A.*, 859; 4 *L. R. A.*, 392; 10 *L. R. A.*, 985; 12 *L. R. A.*, 375;

9 Cyc., 577; Clark Cont., 402; Isler v. Lumber Co., 146—556; Lumber Co. v. Smith, 150—253; Williams v. Bitting, 159—321; Temple Co. v. Guano Co., 162—87. Instances: "Accurate survey," horizontal and not surface measure, Gilmer v. Young, 122—806; "kiln run," in sale of bricks, Shute v. Cotton Mills, 132—271; "forthwith" means immediately, Whitehurst v. Ins. Co., 52—433; but "forthwith" and "immediately" do not exclude any interval, but only an unreasonable one. Claus v. Lee, 140—552; "a few hundred dollars" in a contract involving \$30,000, includes \$2,160, Swepson v. Summey, 64—293; "heirs" construed next of kin, Sugg v. Tyson, 9—472; "signed" not construed seized in a covenant, Haigler v. Simpson, 44—385.

Facts and circumstances at the time may be used as a "key to the meaning." Richards v. Schlegelmich, 65—150; Starnes v. Erwin, 32—226; 2 Page Cont., sec. 1123; Water Co. v. Trustees, 151—171; Simmons v. Groom, 167—271. Written words control printed words. Johnston v. Ins. Co., 118—643; 2 Page Cont., sec. 1119. Bad grammar, bad spelling and punctuation art not material. Cobb v. Hines, 44—343; 2 Page Cont., sec. 1124. Practical construction by the parties may be resorted to in case of doubt. 2 Page Cont., sec. 1126. For discussion generally, see 17 Am. & Eng. Encyc., 2 *et seq.*; Clark Contracts, 402; 9 Cyc., 577—591.

Implied terms may form part of the contract; as, if price is not named market price is implied. Dickson v. Jordan, 34—79; implied warranty of title in the sale of personalty. Sparks v. Messick, 65—440; implied covenant in a mining lease, to work the mine in a reasonable manner. Conrad v. Morehead, 89—31; and that the person has the requisite skill to perform what he undertakes. Ivey v. Cotton Mills, 143—189. The law in force at the time enters into the contract. Hill v. Brown, 144—117; Miller v. R. R., 141—45; 2 Page Cont., sec. 1117; Morton v. Wash. L. & P. Co., 84 S. E., 1019.

Conflict of laws.—The law of the country where the contract is made determines its meaning and effect. Watson v. Orr, 14—161; Williams v. Carr, 80—294; Bryan v. Telegraph Co., 133—603; Mills v. R. R., 141—45; 1 L. R. A., 655. As to insurance contracts, see Revisal, 4806; Blackwell v. Life Association, 141—117; Horton v. Ins. Co., 122—498; Ins. Co. v. Edwards & Broughton, 124—116.

2. Time as the essence of the contract.

MIZELL v. BURNETT,

Ante (55).

(224) HARDY v. WARD,

150 N. C., 385, 64 S. E., 171—1909.

This was an action for breach of contract. The defendant gave the plaintiff an option to purchase certain timber, "at any time within 30 days of this agreement" upon certain conditions therein mentioned; the plaintiff claimed to have complied with the terms, except that the price was not tendered nor a deed offered within the 30 days. There was a judgment for the defendant and plaintiff appealed.

CONNOR, J. . . . That time was of the essence of the contract was recognized by both parties, and we think correctly so. If the parties agree upon a day of performance, in the absence of waiver or those providential interventions recognized as sufficient to relieve them from strict performance, the courts are not

permitted to do so. The equitable doctrine that, in executory contracts for the sale of land, time is not of the essence, is subject to well-defined exceptions. Among the circumstances which will take a contract out of the operation of the doctrine are "the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right." Bisph. Eq., 391. Among the contracts mentioned by Mr. Bispham which, by reason "of the subject-matter," are exceptions to the doctrine are contracts for sale of "trades or manufactories or mines." He further says: "As to 'surrounding circumstances,' which may render time of the essence of the contract, they must, of course, depend upon the facts of each particular case, such as whether the value of the property has greatly diminished, whether the vendee has bought to sell again, and so forth. Indeed, in this country, the fact that land bears a much more commercial character than it does in England, is subject to more fluctuations and has more of a speculative value, has led to not a few expressions of judicial opinion that time ought, as a general rule, to be considered as of the essence of a contract. But perhaps the safest statement of the law is that the general rule is the same in the United States as in England, but that exceptions growing out of the circumstances of the individual transaction are more numerous and looked upon with more favor." Bisph. 394. It will be found, we think, upon examination of our reports, that the equitable doctrine has usually been applied to cases when upon the execution of a bond for title by the vendor and a bond for the purchase money by the vendee the latter has been let into possession of the land, and both parties, by their conduct, have acquiesced in the *status quo*, notwithstanding the lapse of time. This was the case in *Falls v. Carpenter*, 21 N. C., 237, followed in *Scarlett v. Hunter*, 56 N. C., 84, *Pearson, J.*, saying: "When there is a contract for the sale of land, the vendee is considered, in equity, as the owner, and the vendor retains the title as security for the purchase money. He may rest satisfied with this security as long as he chooses, and when he wants the money he has the same right to compel payment by a bill for a specific performance as the vendee has to call for a title." In such cases "it is taken for granted that the parties are content to allow matters to remain in *statu quo* until a movement is made by one side or the other." The reason upon which these and similar cases are decided fails when the subject-matter of the contract is standing timber, mines or property of which the vendee is not let into possession and the value of which is fluctuating. While we do not question the wisdom or justice of the doctrine which has received the sanction and approval of the chancellors for centuries, we do not think that it

should be extended so as to include contracts which, on account of the subject-matter, surrounding circumstances, etc., would, in its application, defeat the intention of the parties and subject property to unreasonable burdens not in contemplation of the owners when entering into the contract or giving an option. While the courts will not unduly restrict the freedom of contract or constitute themselves guardians for the owners of such property by refusing to enforce the execution of contracts, fairly made, free from obscurity, the terms of which are understood by the parties, we can not fail to see from the records of this court that by printed contracts, skilfully drawn, sometimes of difficult construction, valuable property rights are disposed of and burdens of uncertain extent and more uncertain duration are imposed upon lands. When the enforcement of these contracts is sought by appeal to the equitable powers of the court, a due regard to the rights of parties and the conservation of one of the most valuable natural resources of the State imposes upon us the duty of requiring that the contract shall be free from ambiguity, understood by the parties and based upon a valuable consideration.

In this case it is manifest that specific performance can not be had, because the defendant has parted with his title before the suit was instituted. Recognizing this difficulty, plaintiff asks for damages. In this aspect of the case, there being no equitable element, it must allege and prove strict performance of the contract on its part, according to its terms as modified. This it can not do. We have given the record and the carefully prepared argument of counsel a careful consideration, and are of the opinion that there is no reversible error.

If no time is specified, a reasonable time is implied. *Mining Co. v. Cotton Mills*, 143—307; *Michael v. Foil*, 100—178; *McGowan v. R. R.*, 95—417. What is a reasonable time is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case. *Claus v. Lee*, 140—552; *Murray v. Smith*, 8—42; 11 L. R. A., 526; *Waddell v. Reddick*, 24—424; *Warters v. Herring*, 47—46; 9 Cyc., 613.

At law time is usually the essence of the contract; but not in equity. *Mason v. Hearn*, 45—88; *Scarlet v. Hunter*, 56—84; 2 Page Cont., secs. 1159-1166; 10 L. R. A., 826; 12 L. R. A., 239; 24 L. R. A., 339; *Clark Cont.*, 408; *Bispham's Equity*, secs. 391-394; *Brown v. Ray*, 33—222; *Willard v. Perkins*, 44—253; 9 Cyc., 604; *Trodden v. Williams*, 144—p. 206; *Lumber Co. v. Corey*, 140—462; *McDowell v. R. R.*, 144—721; *Shinn v. Roberts*, 1 *Spencer (N. J.)*, 435, 43 A. D., 636; *Benedict v. Lynch*, 1 *Johns. Ch.*, 370, 7 A. D., 492; *Parkin v. Thorold*, 16 *Beav.*, 59, 6 E. R. C., 503; *Houldsworth v. Evans*, L. R., 3 H. L., 263; *Pollock Cont.*, 504; 6 R. C. L., 896, 898.

3. Penalties and stipulated damages.

(225) THOROUGHGOOD v. WALKER,

47 N. C., 15—1854.

Action of covenant, in which the defendant agreed to do three things, and to pay \$2,500, as liquidated damages in case of failure. Appeal by plaintiff.

BATTLE, J. The bill of exceptions presents an interesting question of damages which has not hitherto been decided in this State. It has, however, been much discussed in England, and, after some conflict of judicial opinions, seems to be settled there upon just and equitable principles.

For the better elucidation of the subject, it may be proper to give a brief history of the manner in which the question came to be entertained in a court of law; and to do this, we need only abridge the clear and accurate account contained in Mr. Sedgwick's work on Damages. (See chap. 16 of the second edition.)

The obligation or bond of the English law is either a single one, in the form of a simple promise to pay money, under seal, or it has a clause appended declaring that the previous obligation shall be void on the payment of some lesser sum of money, or the performance of some particular act. The latter part of the condition of the bond is that which discloses the real nature of the contract, and contains its essence. The former part is the *penalty*. Formerly, if the condition was not strictly complied with, as in regard to the payment of money on a certain day, the moment the day was passed, the penalty became the debt, and at law recoverable; and neither payment, nor tender after the day, would avail; because a condition once broken was gone forever. If the condition were to do any other thing than pay the money and were not fulfilled, the penalty again became the debt, and was recoverable without any reference whatever to the actual damages incurred. In an action of debt upon the bond for a condition broken, the plaintiff recovered the penalty, and the action could not be relieved against either by payment or tender; no defense would avail but a release under seal. Hence, the party was driven for relief to the courts of chancery, which interposed and would not allow the plaintiff to take more than in conscience he ought; holding that the conditions of the bond expressed the agreement of the parties, and that therefore the defaulter should not be compelled to pay the penalty. This practice was followed by the common law court, which ordered the proceedings to be stayed upon the defendant's bringing into court the principal, interest and cost. Finally, this

discretionary power was confirmed by the statute, 4th Anne, chap. 16, secs. 12 and 13, which provided that in actions on bonds, with penalties, the defendant might plead payment after the day, or bring in the principal, interest and costs, and be discharged. This statute has been enacted in this State, and forms the 106th and 107th sections of the 31st chapter of our Revised Statutes. By the statute 8 and 9, Will. III, chap. 2, sec. 8 (which forms the 63d section of the same chapter of the Revised Statutes), it had been declared not long before, "that in all actions, etc., upon any bond or bonds, or on any penal sum for nonperformance of any covenants or agreements in any indenture, deed or writing certain, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury upon the trial of such action or actions, shall and may assess, not only such damages and costs of the suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff, on trial of the same, shall prove to have been broken." The words "may assign breaches," have been held to be imperative, and that a judgment obtained under the former practice would be erroneous. *Rose v. Rosewell*, 5 Term Rep., 538.

These two statutes have produced this result, that in the case of an agreement to do, or to refrain from doing, any particular act secured by a penalty, the amount of the penalty is in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by the jury.

But there is a class of cases, in which upon entering into an agreement, the parties, to avoid all future inquiries, as to the amount of damages which may result from a violation of the contract, may settle upon a definite sum, as that which shall be paid to the party who alleges and establishes the violation of the contract. In these cases, the damages so fixed upon, are termed *liquidated*, *stipulated* or *stated damages*. But even when this course has been adopted, the courts both of law and equity will not always hold the definite sum named, as liquidated damages; but if from the words used, and the nature of the contract, they can infer that such was the intention of the parties, they will hold it to be a penalty. If from the nature of the agreement it is clear that any attempt to get at the actual damages would be difficult, if not impossible, the court will incline to give the stipulated damages which the parties have agreed on. But if, on the other hand, the contract is such, that the strict construction of the phraseology would work absurdity or oppression, the use of the term "liquidated damages" will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties. In

the earlier cases on the subject, we may not perhaps be able to deduce any definite rule, but the later decisions will be found to establish the one, which we have stated, and which is extracted from Mr. Sedgwick's treatise. Without examining all the cases on the subject, we will refer to those cited by the defendant's counsel, which we think are decisive in the case before us.

[The court here discusses the cases of *Ashley v. Weldon*, 2 Bos. and Pul., 346; *Kemble v. Farren*, 6 Bing. Rep., 141; *Hamer v. Flintoff*, 9 Mees. & Wels., 678; *Green v. Price*, 13 Mees. & Wels., 695; *Price v. Green*, 16 Mees. & Wels., 346, to sustain the doctrine.]

The principle of the rule has been recognized in the Supreme Court of the United States, and in the courts of many of the States. See *Tayloe v. Sandiford*, 7 Wheat., 13; *Dakin v. Williams*, 17 Wend. Rep., 447; *S. C. in Error*, 22 Wend., 201, and the cases in other States in a note to 419, page —, of *Sedgwick on Damages* (2 Ed.).

Let us now apply the rule, which we have thus deduced from the cases to the one before us. The defendant, in consideration of his purchase from the plaintiff of one-half of the schooner, John F. Davenport, covenanted to do three things: first, to pay one-half of the debt due by the plaintiff to Doyle, Darvin & Rudder, such half amounting to \$675; secondly, to pay off a note due from the plaintiff to Casey & Davis for \$720; and, thirdly, to permit the plaintiff to redeem half of the vessel, by repaying these sums with interest, at any time within three years after the sale; and if he failed to comply with these terms, he agreed to pay the plaintiff \$2,500 as liquidated damages. It is manifested that if the defendant had failed to pay both, or either of the sums which he agreed to do, he would have broken the covenant as effectually as he did by failing to reconvey. If the sum agreed on by the parties is to be construed liquidated damages, as the term imports, then the defendant will be bound to pay a greater sum for a less; which can not be, as that, according to all the cases, is a penalty. The sum, too, agreed to be paid by the way of damages, is for the breach of any of the stipulations which are of different degrees of importance and value, and so comes directly within the rule laid down in the cases to which we have referred. Nor is the damage for the breach assigned, to wit, the nonreconveyance of a half of the schooner in question, so entirely uncertain as to bring the case within the rule of stipulated damages. We have not learnt that the half of the schooner was of such peculiar value to the plaintiff, as to make altogether uncertain his damage for the defendant's failure to reconvey it to him. The charge of His Honor

in relation to the damage was right, and the judgment must be affirmed.

Per Curiam.

Judgment affirmed.

See Revisal, 1523. Courts will generally construe the contract as a penalty rather than stipulated damages. *Burrage v. Crump*, 48—330; *Gordon v. Brown*, 39—399; *Lindsay v. Anesley*, 28—186; *Morris v. Saunders*, 85—138; *Pendleton v. Elec. Light Co.*, 121—20; *Dunavant v. R. R.*, 122—999; *Wheeldon v. Am. Bonding & Tr. Co.*, 128—69; *Disosway v. Edwards*, 134—254; *Rhyne v. Rhyne*, 160—559; 10 L. R. A., 826; *Monmouth Park Asso. v. Wallis Iron Works*, 55 N. J. L., 132, 19 L. R. A., 456, 39 A. S. R., 626; *Williams v. Vance*, 9 S. C., 344, 30 A. R., 28; *Evans v. Moseley*, 84 Kan., 322, 114 Pac., 374, 50 L. R. A. (N. S.), 890; 4 Am. & Eng. Encyc., 699; 19 *Ib.*, 396; *Bisph. Eq.*, secs. 178, 179; *Clark Cont.*, 411; *Page Cont.*, sec. 1169; 13 Cyc., 89; 6 E. R. C., 540; *Mord. & Mc. Rem.*, 636.

In contracts for service, whether a provision to forfeit a certain part of the wages for failure to give notice to quit will be enforced, seems to depend upon its being reasonable in the particular case. *Pottsville Iron & Steel Co. v. Good*, 116 Pa. St., 385, 2 A. S. R., 614; *Schmipf v. Tenn. Mfg. Co.*, 86 Tenn., 219, 6 A. S. R., 832; *Tenn. Mfg. Co. v. Jones*, 91 Tenn., 154, 30 A. S. R., 865; *Pierce v. Whittlesey*, 58 Conn., 104, 7 L. R. A., 286.

III. Discharge of Contract.

CHAPTER I.

BY AGREEMENT OF PARTIES.

Sec. 1. Waiver, rescission and cancellation.

(226) LIPSCHUTZ v. WEATHERLY,

140 N. C., 365, 53 S. E., 132—1906.

Civil action for price of cigars sold and delivered, in which defendants admitted sale and set up a counterclaim for damages for breach of contract. Plaintiff and defendants entered into a contract in 1901, by which plaintiff agreed to sell to defendants cigars at a reduced price, terms "cash in ten days from shipment, less two percent discount," and also to give defendants control of certain territory for the sale of the cigars as long as they should "push the sale of the cigars." In 1904 plaintiff notified the defendants that he would no longer comply with the contract on account of the defendants' failure to make payment above specified; but proposed to sell defendants cigars on the same terms as they were sold to others, but would fill no order until the defendants sent him telegram that the previous contract was canceled. This telegram was sent, but defendants claimed that they had complied with their contract, had built up a good trade and were damaged by the plaintiff's failure to comply. There was a judgment for plaintiff, and defendants appealed.

CONNOR, J. The real controversy between the parties is presented by the defendants' contention: 1st. That conceding the facts to be as shown by the correspondence, there was no valid rescission of the original or substitution by new contract, for that the agreement to rescind is not supported by any valuable consideration. 2d. That if there was a rescission by mutual consent, their right to recover damages sustained prior to the breach was not waived or surrendered. It is well settled that a contract may be discharged by an express agreement that it shall no longer bind either party. This is usually and correctly termed a rescission. It is equally well settled that such an agreement to operate as a discharge must be supported by a valuable consideration, which may either be a payment in money, something of value, or by a

release of mutual obligations arising out of the contract. In *Brown v. Lumber Co.*, 117 N. C., 287, it is said: "When the contract is wholly executory, a mere agreement between the parties, that it shall no longer bind them is valid, for the discharge of each by the other, from his liabilities under the contract is a sufficient consideration of the promise of the other to forego his rights. . . . If a contract has been executed on one side, an agreement that it shall no longer be binding, without more, is void for want of a consideration. *Clark on Contracts*, 418. Of the several methods by which a contract may be discharged, one is by substitution of a new contract, the terms of which differ from the original. In such cases the release of the obligations of the old and the substitution of new obligations constitute valuable considerations." "It is also well settled that ordinarily a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary other terms of the contract, or may waive and discharge it altogether." *Hastings v. Lovejoy*, 140 Mass., 261. In *McCreery v. Levy*, 119 N. Y., 1, *Andrews, J.*, says: "The agreement annulling the prior contract is supported by an adequate consideration. The new obligation which G assumed under the contract of October 25, 1882, was alone a sufficient consideration. There was a consideration also in the mutual agreement of the parties to the prior contract which was still executory, although in the course of performance, to discharge each other from reciprocal obligations thereunder and to substitute a new and different agreement in the place thereof." The principle is well illustrated in *Dreifus Block & Co. v. Salvage Co.*, 194 Penn., 475. Assuming that the intention of the plaintiff to rescind the contract, as communicated by him to defendants on May 28, was a breach of its terms, the defendants may have stood by their rights under the contract and sued for such damages as they sustained. Instead of doing so, they desired to continue purchasing cigars from the plaintiff, who refused to sell on any other terms than an assent to the rescission. The defendants elected to assent to plaintiff's terms, deeming it conducive to their interest to do so. The status of the parties at this time is well illustrated by what is said by Mr. Justice *Dean* in *Dreifus Co. v. Salvage Co.*, *supra*. In speaking of a breach of a contract by defendant to deliver steel at a fixed price, he said: "Assume . . . that there was a distinct declaration that the company would not perform its contract; still if anything can be clear, it is, that above all things, plaintiff did not want a lawsuit for damages; at that stage, their damages were wholly uncertain, depending on the fluctuating price of steel; they

did know they wanted the steel; what damage they might want by reason of the defendant's breach, or what they might sustain, they did not know. In this dilemma they sought for and obtained a new contract expressly canceling the old. . . . They agreed to accept a fixed quality and quantity of merchandise at fixed times and prices, instead of the uncertain event of a lawsuit." In *Goebel v. Linn*, 47 Mich., 489, plaintiff had made a contract to furnish defendant, who was a brewer, ice, during the season at a fixed price. During the life of the contract he notified defendant that he would not furnish any more ice unless the defendant paid a very much larger price. Defendant, after protesting, assented to the change in price and purchased the ice at the price for which the action was brought. He set up, as a defense, that the note for the price of the ice was without consideration, etc. *Cooley, J.*, said that the defendant had a right to refuse to buy the ice at the advanced price and sue for damages for breach of contract. "But defendants did not elect to take that course. They chose, for reasons they must have deemed sufficient at the time, to submit to the company's demand and pay the increased price rather than rely upon their strict rights under the existing contract." We are of the opinion that the defendants elected to consent to the cancellation or rescission of the original contract, in consideration of the substituted contract by which the plaintiff agreed to sell them cigars upon the terms set out in the letters of May 28 and June 6, 1904, and the telegram of June 9, and that this consent was based upon a valuable consideration. The defendants say that conceding this to be true, their right to recover damages which had accrued prior to such rescission was not affected thereby. Certainly after a contract is discharged, either by rescission or by substitution of a new contract, no action can be maintained on the original contract. For any benefits accruing to either party by performance of the contract, unless expressly released, an action as upon a *quantum meruit*, if it be labor performed, or *quantum valebat*, if property received, may be maintained. It is, not upon the contract, but upon an implied *assumpsit*.

In *Dreifus Co. v. Salvage*, *supra*, it is said: "The term cancellation of a contract implies a waiver of all rights thereunder by the parties. If after a breach by one of the parties they agreed to cancel it and make a new contract with reference to its subject-matter, that is a waiver of any cause growing out of the original breach, and this is the rule even though the original contract was under seal." We have discussed the case upon the assumption that the plaintiff made the first breach of the contract. It is by no means clear that, upon the admitted failure by the defendants to pay the bills for the cigars within ten days, plaintiff was not re-

leased from further performance on his part. It is often difficult to say when, in a bilateral contract such as this, stipulations are of the essence of the contract, and the failure to perform them releases the other party from further performance. However this may be, there was certainly sufficient doubt to sustain the agreement to rescind or to substitute a new contract. It is well settled that the release of controverted claims constitutes a valuable consideration. It may well be that the defendants preferred to enter into the new contract for the purpose of securing the cigars with which to supply their trade, rather than engage in litigation of doubtful result. However this may be, they did so elect, and having procured the cigars upon their express agreement to rescind the original contract, they have no just right to complain if required to do so. If they intended reserving any demand for damages, common fairness required them to say so. Upon an examination of the entire record we find no error.

The judgment must be

Affirmed.

FESTERMAN v. PARKER,

Ante (83).

Hassard-Short v. Hardison, 114—482, 117—60; Teeter v. Manfg. Co., 151—602; Palmer v. Lowder, 167—331; McCreery v. *Day, 119 N. Y., 1, 16 A. S. R., 793, 6 L. R. A., 503; 9 Cyc., 593; 6 R. C. L., 921; Morecraft v. Allen, 78 N. J. L., 729, 75 Atl., 920, L. R. A. 1915 B, 1. A as tenant of B held over at the expiration of the lease; B made him a proposition for a new lease on different terms; A did not accept, but vacated; B thereby waived his right under the old lease. Drake v. Wilhelm, 109—97. A ordered machinery from B, to be shipped in ten days; in four or five days A wrote to B not to ship the machinery, and offered to pay damages; B did not answer this letter nor ship the machinery; this was evidence of a rescission. Reavis v. Crenshaw, 105—369. In the cancellation of an executory contract for the sale of land, the law implies a promise on the part of the vendor to repay the purchase-money. Beaman v. Simmons, 76—43; and for improvements, Smith v. Stewart, 83—406; Houston v. Sledge, 101—640.

For waiver of condition in insurance contract, see Horton v. Ins. Co., 122—498. Rescission of insurance contract, Waters v. Annuity Co., 144—663; Murphy v. Ins. Co., 167—334.

Sec. 2. Substitution.

(227) SIMMONS v. CAHOON,

68 N. C., 393—1873.

Civil action in which there was a judgment for the plaintiff, and defendant appealed.

READE, J. The plaintiff sold defendant a horse, for which the defendant was to pay at a given time \$100 in bank notes or \$125 in Confederate notes, at the defendant's option. At the time speci-

fied the defendant offered to pay \$125 in Confederate notes, taking out his pocketbook and showing the money. The plaintiff refused to take the Confederate notes because of their depreciation, and demanded that the defendant should give him his bond for \$100, and differed with the defendant as to the terms of the contract. The plaintiff then said he would take \$125 in State scrip, to which the defendant assented, and offered to go immediately home, some distance off, and get the scrip. But the plaintiff said no, I will call at your house as I pass this evening, and get it. This was assented to by the defendant. When the plaintiff passed the defendant's house, the defendant had the money ready and called to the plaintiff to stop and get it. Plaintiff said he would call on his return and get it. But he did not call, and never has called; and the defendant has always been ready. But the State scrip and the Confederate notes became worthless by the results of the war.

Under the charge of His Honor the case was made to turn upon the validity of the tender of the Confederate notes; His Honor instructing the jury that it was not a sufficient tender. However that may be, it is outside of the case; because the first contract was rescinded, and the parties compromised their controversy by entering into the *new* contract. By the terms of the new contract, the plaintiff was to call at defendant's house and get the State scrip. This he has never done. And having failed to comply with his part of the contract to call at defendant's house, which was precedent to the defendant's undertaking to pay, he can not recover.

The case of *Erwin v. W. N. C. R. R. Co.*, 65 N. C., 79, is directly in point. There is error.

Per Curiam.

Venire de novo.

See preceding case, and *Brown v. Mfg. Co.*, 117—287; 6 L. R. A., 503. A new contract inconsistent with the terms of the old one is a rescission, either entirely or *pro tanto*. *Sizemore v. Morrow*, 28—54; 3 Page Cont., secs. 1339-1350; Clark Cont., 418, 420; *Morecraft v. Allen*, 78 N. J. L., 729, 75 Atl., 920, 54 L. R. A. (N. S.), 1, and note; 6 R. C. L., 923.

For the acceptance of part of debt in satisfaction, see *Koonce v. Russell*, 103—179; *ante* (85).

Novation.—A was indebted to B by note and mortgage; C agreed with A to settle the debt, and gave his note to B, which was accepted as satisfaction; this was a discharge of A's debt. *Walker v. Mebane*, 90—259; 5 L. R. A., 414; 6 L. R. A., 668; 3 Page Cont., 351; Clark Cont., 422; 21 Am. & Eng. Encyc., 660; 9 Cyc., 595.

Sec. 3. Form of discharge.

1. Contracts under seal.

• (228) ADAMS v. BATTLE,

125 N. C., 152, 34 S. E., 245—1899.

Civil action to recover money under an agreement made with defendant's testator. There was a judgment for plaintiff, and defendants appealed.

FAIRCLOTH, C. J. On January 22, 1890, the plaintiff, by deed, conveyed a large amount of real and personal property to W. H. Pace in trust to pay plaintiff's debts in the manner described, with power to collect, sell the property at private or public sale, and to do the usual duties of a trustee in such cases. Pace died in April, 1893, and this action was brought in October, 1896, and it is agreed that the trust was closed in the lifetime of the trustee, except as to the matter controverted in this action. The deed provided that the trustee might retain 4 percent commissions on receipts and disbursements, that is, 8 percent on the total amount, which was \$2,461.01.

The defendants are the personal representatives of the trustee. The plaintiff was allowed to prove by parol that, some days after the deed was executed, Pace agreed with plaintiff that if there was no litigation in the courts respecting the trust he would charge only 2½ percent on receipts and disbursements. He also proved that there was no suit brought, and there is no evidence of any unusual trouble in executing the trust. The defendant excepted to the admission of this parol evidence and to the charge of the court in respect thereto. The verdict was for the plaintiff.

The defendant's contention is that the evidence is incompetent to prove that the parties agreed subsequently that the commissions should be less than specified in the deed, unless done in as solemn a manner as the deed was made, that is, under seal, under the maxim *eo ligamine, quo ligatur*. It seems that no verbal agreement contemporaneous with the execution of an instrument under seal will be heard to contradict or vary its terms. The effect of a subsequent agreement by the same parties has been much discussed by different courts, and in some of the States the matter is put to rest by legislation. But we are informed by counsel that the question has not yet been decided in our State, and we find no such decision.

It was an ironclad maxim of the common law that an obligor would only be released by an instrument of as high dignity as that by which he was bound, that is, being obligated by a seal he could

be released only by an instrument under seal. Technically, this is the rule of modern times, unless changed by statute, but practically it is seldom enforced. To this rule the exceptions were and are so numerous that seldom can the rule be applied. In an action on the bond or other sealed instrument, the debtor pleads and proves the actual receipt of the money by the obligee; no court could hesitate to hold this to be a release and discharge of the bond. Suppose the debt secured by a mortgage, a release and discharge need not be under seal. Suppose the principal of a note under seal pays the debt and the sureties are sued on the same, would any court require them to show that their principal had been discharged under seal? Suppose again, that a landlord leases land for a term of years under seal, and during the term the premises are greatly damaged without any fault of the lessee, or that they have greatly depreciated in value, or have become partially unfit for the purpose intended, and the landlord, conscious of these and similar facts, agrees verbally with the lessee that, for the balance of the term he will take less rent than is stipulated in the deed; would not the lessee be protected by such agreement? If proof of payment will discharge, why should not an agreement to discharge have the same effect between the same original parties?

It seems difficult to find a case where the parties, bound to each other by an instrument under seal, will not be discharged by parol proof of facts if they are sufficient in themselves to constitute a discharge. In such matters, the defenses are performances *in pais*, and are probably of more value to business men than the dignity of being sheltered by a seal. The chief reasons for the sacredness of the seal have ceased, since statutes and courts of equity have been liberally removing the hard places of the common law. The dignity of the seal is due more to the original form of the instrument than to the real interest and intention of the parties.

Whether the trustee intended to retain 8 percent commissions we are not informed, as he had recently before his death closed out the other trust matters, nor is this very material now. He was a practicing attorney and understood technicalities of the law, and we must assume that when he made the parol agreement he did so in good faith. We are led to the conclusion that the evidence was admissible and that the charge of the court was not erroneous. The result seems to be full justice without the infringement of any sound principle of law. [The court then holds that the action is not barred by the statute of limitations.]

The surrender of a bond to the obligor and its cancellation have the same legal effect as a deed in writing, to wit; a release of the cause of action on the bond. *Paxton v. Wood*, 77—11. Where the note for the purchase-money is given up and the deed is intended to be, but is not surrendered, subsequent registration does not prevent its cancellation in equity. *Love v.*

Belk, 36—163. The surrender of an unregistered deed operates as a discharge. *Beaman v. Simmons*, 76—43; *Davis v. Inscoe*, 84—396; *Austin v. King*, 91—280; *Hare v. Jernigan*, 76—471; but not after registration. *Linker v. Long*, 64—296; *Herring v. Warwick*, 155—345. A parol agreement with the principal in a bond to extend the time discharges the surety. *Carter v. Duncan*, 84—676. But at common law a parol discharge of a bond was invalid. *Bank v. Littlejohn*, 18—563. See *Johnson v. Johnson*, 10—556.

MILLER v. THAREL,

Ante (200).

2. Simple contracts in writing.

(229) MAY v. GETTY,

140 N. C., 310, 53 S. E., 75—1905.

Civil action for specific performance of contract to convey land. The plaintiff made a contract to sell the land to one Maxwell, who never tendered any money, except \$100 paid at the time, and never demanded any deed, but told plaintiff he could not pay for it, and to make his money out of the land. The papers were not given up, but Maxwell left the State and had been gone several years, when plaintiff sold to defendant. The defendant resists the action on the ground that plaintiff can not make a good title. The court held that Maxwell had abandoned the contract and relinquished his rights. There were other questions involved, but not on this point. There was a decree for plaintiff, and defendant appealed.

WALKER, J. . . . (There were three questions considered, the first being, "Did Maxwell agree with May to rescind, and thereupon abandon the contract of sale?")

It is now well settled that parties to a written contract may, by *parol*, rescind or by matter *in pais* abandon the same. *Faw v. Whittington*, 72 N. C., 321; *Taylor v. Taylor*, 112 N. C., 27; *Holden v. Purefoy*, 108 N. C., 163; *Riley v. Jordan*, 75 N. C., 180; *Gorrell v. Alspaugh*, 120 N. C., 362. In the case first cited, *Bynum, J.*, for the court, says: "The contract is considered to have remained in force until it was rescinded by mutual consent, or until the plaintiffs did some acts inconsistent with the duty imposed upon them by the contract which amounted to an abandonment." *Dula v. Cowles*, 52 N. C., 290; *Francis v. Love*, 56 N. C., 321. What will amount to an abandonment of a contract is of course a question of law and the acts and conduct which are relied on to constitute the abandonment should be clearly proved, and they must be positive, unequivocal, and inconsistent with the existence of a contract, but when thus established they will bar the right to specific performance. *Miller v. Pierce*, 104 N. C., 390;

Faw v. Whittington, *supra*; Holden v. Purefoy, *supra*. We are of the opinion that the facts found by the referee and the court are sufficient to show a rescission of the contract and an abandonment of all rights under it by Maxwell. They are quite as significant for the purpose of indicating the intent of the parties, and especially the purpose of Maxwell to relinquish all his rights, as any we find in the books which have been held sufficient to defeat a claim for specific performance or the assertion of an equity in the property. Francis v. Love, *supra*. There was evidence to sustain the findings of fact as to the rescission and abandonment, and this being so, the findings will not be reviewed by us. Battle v. Mayo, 102 N. C., 413.

See also Devereux v. Burgwyn, 40—351; Thornburgh v. Mastin, 93—258; Banks v. Bank, 77—186; Palmer v. Lowder, 167—331; Faust v. Rohr, 167—360.

Sec. 4. Provision for discharge in the contract. Condition subsequent.

(230) SUGG v. INSURANCE CO.,

98 N. C., 143, 3 S. E., 372—1887.

Civil action on a policy of fire insurance, which contained among other provisions a clause against other insurance. The plaintiff took out two policies on the property in other companies, without the knowledge or consent of the defendant.

There was a judgment for the defendant, and plaintiff appealed.

MERRIMON, J. The contract of insurance embodied and set forth in the policy sued upon must receive a reasonable and just interpretation, and the intention of the parties to it, thus ascertained, must prevail. Contracts of this character, though in some respects peculiar, are governed by the same principles that govern other contracts, and are not different from others as to the rules of interpretation applicable, in varying aspects of them. The purpose of courts in construing them, is to ascertain what the parties mean and intend—what they have respectively agreed to do or not to do—how they have agreed to be affected—to be bound or not to be bound. It is not the province of the court to amend, modify or make a contract for the parties; or to reform their contract so as to render it reasonable, expedient and just, or, in the absence of fraud, accident, or mutual mistake, to relieve them from misadventure, inadvertence, hard bargains, disadvantages, loss and damage, occasioned by lack of foresight, forgetfulness, misfortune and negligence. Contracts are serious things, and parties capable of contracting must be held by the courts when properly called upon,

to a due observance of their contracts, and those of insurance as well as others, however unfortunate, disadvantageous, or disastrous the results following from them may be to one side or the other. All lawful contracts must be binding upon those who make them, and as they make them.

Now the *feme* plaintiff expressly agreed with the defendant, that the policy sued upon should be void, if there should "be any other insurance, *whether valid or otherwise*, on the property insured, or any part thereof, at the time this policy is issued, or at any time during its continuance, without the consent of this company (the defendant) endorsed thereon."

It is admitted by the plaintiff that subsequently to the execution of the policy, and "during its continuance, without the consent" of the defendant, written or otherwise, "other insurance" was taken and had by the *feme* plaintiff upon the property so insured, for very considerable sums of money, of which the defendant and its agents had no notice—it had no notice of, nor did it in any way consent to the same. There was, therefore, no waiver of its rights as to the forfeiture thus wrought, if it might under other circumstances have done so. The mere fact that the plaintiff forgot "the existence of the policy sued upon, and with no intention to defraud the defendant" at the time the subsequent insurance was taken, can not help her. The defendant was in no way or sense to blame for such forgetfulness, and can not be prejudiced by it.

It appears that the two policies of "other insurance," each contained this provision: "Or if there shall be any other insurance, *whether valid or otherwise*, on the property insured, or any part thereof, at the time this policy is issued, or at any time during its continuance, without the consent of this company endorsed hereon, this policy shall be void."

It is contended for the plaintiff, that inasmuch as there was other existing insurance of the property thus insured, at the time these policies were executed, they were ineffectual and void—never took effect—and, therefore, the policy sued upon was unaffected by them, and remained valid.

This argument is without substantial force. The clause of the policy sued upon recited above, expressly embraced "any other insurance, *whether valid or otherwise*," and provided that the same should render the policy void.

The very purpose was to exclude and guard against, not only subsequent valid insurance, but all other, supposed or intended to be valid. Else why were the words, "or other insurance," used? Are these significant and apt words to be treated as meaningless? Did the parties intend that they should serve no purpose? Surely

these questions can not be answered in the affirmative. The terms employed are explicit, comprehensive and exclusive, and they imply a distinct, obvious purpose. The manifest purpose of the provisions in question was to prevent possible motive—the creation of it—of the insured to obtain larger insurance of the property, and then burn it, with a view to get the money agreed to be paid by each and all the insurers, in case of loss. If the insured *believed* the subsequent insurance valid, as he might do, whether it were so or not, such belief would raise the motive intended to be guarded against as certainly as if it had been valid. To guard against such possibilities is not unreasonable nor unlawful; when parties choose to incorporate into their contracts provisions against them, it is the plain duty of the court to give them effect.

That the plaintiff acted in good faith in respect to the subsequent insurance, and the defendant suffered no injury, can not prevent the latter from having the full benefit of the forfeiture occasioned by the violation of the clause in question of the policy, because the parties so agreed, and it may be but for this agreement, the defendant would not have made the contract of insurance at all. It may be that as matter of grace, and liberal, fair dealing, the defendant ought to share in the loss sustained by the *feme* plaintiff; but with this we have nothing to do.

Judgment affirmed.

To same effect, *Sossamon v. Ins. Co.*, 78—145; *Biggs v. Ins. Co.*, 88—141; *Alsbaugh v. Ins. Co.*, 121—290; *Hayes v. Ins. Co.*, 132—702; *Geringer v. Ins. Co.*, 133—407; *Weddington v. Ins. Co.*, 141—234; *Black v. Ins. Co.*, 148—169; *Williams v. Casualty Co.*, 150—597; *Modlin v. Ins. Co.*, 151—35; *Sexton v. Ins. Co.*, 157—142; *Watson v. Ins. Co.*, 159—638; but the liability continues if the insured was ignorant of the violation. *Horton v. Ins. Co.*, 122—498; *Alston v. Ins. Co.*, 80—326; *Coggins v. Ins. Co.*, 144—7 (iron safe clause).

(231) HUNTLEY v. McBRAYER,

— N. C., —, 85 S. E., 213—1915.

This was a proceeding for partition in which the defendant pleaded sole seisin. The defendant claimed under a deed from William and Jane Henson, which contained the following provision: "For and in consideration that the parties of the first part are both old and frail, and the parties of the second part agree and bind themselves to see that they are maintained and properly cared for as long as they or either of them live. . . . But if the parties of the second part should fail to comply with their part of the agreement, this is all void and of no effect." There was no proof that there was any violation of the agreement to support William Henson during his life, but the plaintiffs proposed to prove that Jane Henson made a demand which was not complied with, but it did not appear when this demand was made

nor what was its nature. The court ruled that the evidence was not sufficient, and the plaintiff took a nonsuit and appealed.

Affirmed.

WALKER, J. We are of the opinion that the words of the deed create a condition subsequent. No precise words are required to make a condition precedent or subsequent. The construction must always be founded on the intention of the parties. If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act, after taking possession, then the condition is subsequent. *Underhill v. Saratoga & Washington R. Co.*, 20 Barb (N. Y.), 455. The effect of the deed, therefore, was to vest the fee simple of the estate in the grantees, subject to be defeated by a neglect or refusal to perform the condition. It is true that such conditions are construed strictly against the grantor, as they tend to defeat estates, but the construction should be conformable to the letter and obvious intent of the grant, and, if there is only one which will give effect to all the words of the instrument, it will, of course, be followed. 13 Cyc., 687, 688. The meaning of this deed is clear that the grantees shall see to the maintenance and proper care of the grantors during their joint and several lives, and, failing to do so, that the deed shall be "void and of no effect." We have recently discussed the principles applicable to conditions of this sort in deeds, and it would be useless to repeat what is there said. *Britton v. Taylor*, 84 S. E., 280.

The only question we need consider here is whether there was a sufficient offer to prove facts that would show a violation of the condition. It is stated in the facts admitted that a demand was made by Jane Henson upon the grantees, but we are not informed as to its terms, so that we can not see that it was of a kind to put the grantees in default if they did not comply with it. This would be very indefinite proof, and a wholly inadequate admission, upon which to declare a vested estate forfeited for breach of a condition. It must appear clearly that there has been a substantial failure to perform the covenant for support before the power of the court will be exerted to put an end to the estate conveyed and return it to the grantor.

See *Ecroyd v. Coggeshall*, 21 R. I., 1, 41 Atl., 260, 79 A. S. R., 741; 1 L. R. A., 380, and note; 5 L. R. A., 422, and note; *Hanley Falls Creamery v. Milton Dairy Co.*, 126 Minn., 226, 148 N. W., 46, 52 L. R. A. (N. S.), 718; 6 R. C. L., 906. Whether a provision in the deed that the grantor shall sup-

port the grantee is a condition precedent, a condition subsequent, or a charge upon the land, see *Helms v. Helms*, 135—164; 137—206; *Whitaker v. Jenkins*, 138—176; *Cuthbertson v. Morgan*, 149—72.

(232) AUSTIN v. MILLER,

74 N. C., 274—1876.

Civil action on contract. The defendant wanted to hire a horse from the plaintiff to drive from Lenoir to Boone, but the plaintiff was unwilling for him to take the horse without a driver. The defendant said, "Price your mare, and if I do not bring her back to-morrow night as good as she is I will pay you your price for the mare." Plaintiff said, "I will take \$250 for the mare, and if she is not hurt I will take her back; if she is, you must pay me for her, and I shall expect you to do it." The mare was returned five days later, damaged to the amount of \$100, and defendant has not paid the price. The plaintiff asked for judgment for \$250, and offered to credit \$150 for which he sold the mare. Judgment for defendant, and plaintiff appealed.

READE, J. It is not controverted that if the defendant had not returned the mare at all, he would have been liable for the price agreed on, \$250. And the same is true if he had offered to return her injured, and the plaintiff had refused to receive her. So the question is, whether the fact that he did, after the time agreed on, return the mare in a damaged condition, when she was received by the plaintiff and sold, make any difference? Can we say, as a matter of law, that the taking of the mare back was a rescission of the contract, or a waiver of the plaintiff's right to recover for a breach of contract? It is evident, as a matter of fact, that the plaintiff did not intend it as a rescission or waiver, for he had already instituted his suit for damages, and continued to prosecute it. The reasonable implication is, that when the plaintiff received the mare back, he had no purpose to release the defendant, but fearing that if he refused to take her, he might lose the mare and the price too, he determined to take her as a *security* for the claim which he had against the defendant, and to do the best he could with her. If this was not so, then it would have been easy for the defendant to submit an issue to the jury embracing the inquiry as to the *intent* of the plaintiff. This he chose not to do.

If A agrees to deliver to B an article of a certain quality for which B is to pay a certain price, and an article of an inferior quality is offered, B may refuse to receive it. And, generally, this is the better way, the contract being executory. But if B has paid for the article, and by rejecting it he may lose the money and the article both, then the better way is for him to receive the article and make the most of it, and sue A for a breach of contract.

That is substantially what the plaintiff did in this case. It is like the shingle case, *Cox v. Long*, 69 N. C. Rep., 8. There Long had agreed to furnish Cox shingles of a certain quality, at a certain price, and Cox had paid for them. Shingles of an inferior quality were delivered, and Cox, under the stress of circumstances, and to keep his house from injury, received and used them, and sued Long for a breach of his contract, and recovered. So here, the defendant promised to deliver the mare in a certain condition; he delivered her in an inferior condition. The plaintiff, under stress of circumstances, to keep from losing his mare, took her and used her, and sued for breach of the contract. *Spears v. Halstead*, at this term.

There is error. Judgment reversed, and judgment here for plaintiff upon the finding of the jury, upon the basis of \$250 for the breach of the contract, less \$150, which plaintiff waived on sale of the mare, with interest from time of the verdict.

Per Curiam.

Judgment accordingly.

See also *Hargrave v. Smith*, 62—165; *Ray v. Thompson*, 12 Cush. (Mass.), 281; 9 Cyc., 600.

Excepted risks.—In contracts of common carriers, act of God or the public enemies, or inevitable accident will operate to discharge from liability, where there is no negligence. *Backhouse v. Sneed*, 5—173; *Harrell v. Owens*, 18—273; *Boner v. Steamboat Co.*, 46—211; 53 L. R. A., 673; 1 Am. & Eng. Encyc., 272, 588; 5 *Ibid.*, 234; negligence must be the proximate cause, *Ibid.*, 258, giving two views; 6 Cyc., 377; *Clark Cont.*, 428; 11 L. R. A., 615. For impossibility of performance in other contracts, see that subject, *post*.

Discharge optional.—By the terms of the agreement either party may have the right to terminate the contract upon notice. Where no time of employment is fixed between broker and principal, either party may terminate it at will, acting in good faith. *Abbott v. Hunt*, 129—403. Landlord and tenant regulated by statute, unless otherwise fixed by the terms of agreement. *Reisal*, 1984; *Harty v. Harris*, 120—408. Contract terminated on thirty days' written notice, *Patrick v. R. R.*, 93—422. Contract of hiring by the year, with right of either party dissatisfied to stop. *Booth v. Ratcliffe*, 107—6; *Trust Co. v. Adams*, 145—161. See 3 Page Cont., secs. 1360, 1361; *Clark Cont.*, 429. In a contract for personal service, when no time is fixed and no stipulation as to payment is made, it is presumed in England to be for a year; but in this country it may be terminated at the will of either party. *Solomon v. Sewerage Co.*, 142—445; *Currier v. Lumber Co.*, 150—694; *Wagon Co. v. Rigan*, 151—303; 20 Am. & Eng. Encyc., 14.

CHAPTER II.

DISCHARGE BY PERFORMANCE.

Sec. 1. Substantial performance.

(233) RILEY v. CARPENTER,

143 N. C., 215, 55 S. E., 628—1906.

Civil action by plaintiff on contract for sale of yarn. Defendant admitted the amount claimed by plaintiff, but set up a counterclaim for damages for breach of the contract by plaintiff in failing to deliver the remainder of the yarn contracted for. Judgment for plaintiff, and defendant appealed.

BROWN, J. The court charged that "If the plaintiff shipped the goods with bill of lading attached, and defendant could have gotten the goods by calling at the depot and paying for the yarn, that would be substantial compliance with the contract, and if you find from the evidence that this is true, you will answer the second issue 'No.'"

In this we think there was error. The contract that bills of lading were to be sent direct to the defendant, and upon receipt of the goods he was to remit to the plaintiffs, was not performed when the plaintiffs billed the goods to themselves with draft attached. It was not a substantial compliance with the contract, but a wilful violation of it. The defendant had the right to insist upon such a contract, and the plaintiffs need not have agreed to it, but having agreed to it, they should have performed it. If the defendant's credit had become impaired and his solvency seriously doubted, the plaintiffs could have refused to ship the goods, and should then have notified the defendant of the reason. There is nothing of that sort in the case. The defendant may have thought, and with some reason, that if all his goods were shipped C. O. D. it would impugn his credit, and for that reason insisted as a part of the contract upon direct shipments. One who invokes the doctrine of substantial performance in order to show a right to recover on a contract, must present a case in which there has been no wilful omission or departure from the terms of the contract; he must have faithfully and honestly endeavored to perform it in all particulars. To justify a recovery on a contract as substantially performed, the omission must be the result of a mistake or

inadvertence and not intentional. *Elliott v. Caldwell*, 9 L. R. A., 53, and cases cited.

If the evidence of the defendant is to be believed, the departure from the alleged contract was intentional. He says: "I told them when we talked of the modification of this contract, and as a part of the modification and understanding, it was agreed that no goods were to be shipped to me with bill of lading attached. I expressly told Corbett that I never received or had goods shipped to me with bill of lading attached, and I would not receive any goods that way, and they were not to be shipped to me under the modified terms in any such manner, but bills of lading and invoices were to be sent direct to me, and upon receipt of the goods I was to remit to Riley & Co., Boston, Mass." As the terms of the modified contract do not seem to be in dispute, we are of the opinion that the plaintiffs violated it when they shipped the goods C. O. D., and that the defendant was justified in not receiving them, and that the defendant is entitled to recover, as damages, the difference between the contract price and what it reasonably cost the defendant on the market to supply the yarns which plaintiffs failed to supply.

Let there be a new trial upon the second and third issues.

New trial.

Substantial performance, one which is *bona fide*, gives to the obligee all that by the intent of the contract he was to receive. *Calloway v. Hamby*, 65—631; *Brown v. Morris*, 83—251; in equity, *Shaw v. Vincent*, 64—690; *Bispham's Eq.*, sec. 389. Question of fact for the jury, *Russell v. Comrs.*, 123—264. Where there was an agreement by the client to pay the attorney \$100, to get him out of six suits, and the attorney was successful in all but one, which went to the Supreme Court, where a new trial was granted, and afterwards a *nol. pros.* was entered; this was substantial compliance, though the attorney did not go to the Supreme Court. *Candler v. Trammell*, 29—126; 9 Cyc., 686. See 3 Page Cont., secs. 1385-1389; *Clark Cont.*, 431; 5 L. R. A., 270; 9 L. R. A., 52; *Corinthian Lodge v. Smith*, 147—244; *Meincke v. Falk*, 61 Wis., 623, 50 A. R., 157; *Foeller v. Heintz*, 137 Wis., 169, 118 N. W., 543, 24 L. R. A. (N. S.), 327; 6 R. C. L., 966.

Sec. 2. Performance to the satisfaction of another.

(234) *YOUNG v. JEFFREYS*,

20 N. C., 357—1839.

Action of *assumpsit* on special count, and for work and labor done. The plaintiff, as the lowest bidder, made a contract with the defendants as commissioners for the congregation, to build a church according to certain specifications, to be paid for "if" or "when" the work was done according to specifications and accepted by the commissioners. When the plaintiff finished the work, the commissioners refused to accept it because they said it was not

done according to specifications, pointing out four particular objections. The plaintiff claimed that the first two were on account of changes consented to by the defendants, and that the others were frivolous and unfounded. His Honor instructed the jury that if they should find that the plaintiff completed the work according to specifications except the changes consented to, and that the other objections were frivolous, the plaintiff was entitled to recover. There was a verdict and judgment for plaintiff, and defendant appealed.

GASTON, J. I am instructed to declare the opinion of this court that the judgment rendered below is erroneous; that on the matter reserved the law is for the defendants; and that under the agreement of the parties the verdict is to be set aside, and there is to be judgment of nonsuit.

The court assents to the propriety of that part of His Honor's opinion which holds that the jury might consider the special contract made between the plaintiff and these defendants at the time of bidding, modified in the particulars and to the extent which had been subsequently agreed upon between them and the plaintiff. If, therefore, the commissioners had rejected the building because of those changes, and these only—and had approved of it as conforming to the specifications in all other respects, the defendants would have been liable to the plaintiff upon their agreement. But the court holds that, inasmuch as the commissioners rejected the building because in their judgment it did not conform to the other specifications, then, however, unfounded and frivolous these objections of the commissioners might be deemed by the jury, the defendants were not liable to the plaintiff upon the agreement given in evidence, and which, according to the practice that obtains with the profession where a formal declaration has not been previously drawn out at length, must be understood as the agreement contained in the declaration. This opinion is founded upon the principle that the defendants are bound so far and so far only as they consented to be bound. Now, *all* the evidence of their agreement made the "acceptance" of these commissioners *one* of the conditions of their engagement. It is immaterial which set of words testified to by the witnesses was used—whether to pay *if* the commissioners accepted, or *when* the commissioners accepted; for unless these words do not mean what they obviously import, the addition of them manifests that the commissioners were to *pass* upon the question whether the work was completed according to the specifications. And the opinion is deemed by us erroneous, because in effect it strikes out of the agreement one of the essential terms—and holds the defendants bound to pay without or be-

fore such acceptance, when they have consented to pay only *if* or *when* the acceptance shall take place.

There is nothing unreasonable, much less illegal, in such a condition. Whether a work of art has been done with proper materials and in a workmanlike style is an inquiry on which honest differences of opinion may prevail even among persons skilled in the art, and on which men of ordinary pursuit are very unfit to pass. It is, therefore, in agreements for works of this kind, a prudent and common stipulation for the prevention of controversies, that the construction of the work shall be determined by some person in whose judgment the parties have confidence. If, however, the judgment of the forum appointed by the parties is to be disregarded, or revised by a court and jury, the stipulation is unmeaning. There can be no question but that the view entertained by this court would prevail, if the agreement between these parties had been in writing, and contained a stipulation in the words used by any of the witnesses who testified as to the agreement. *Morgan v. Birnie*, 9 Bing. Rep., 672; 23 Eng. Com. Law Rep., 414; *De Vile v. Arnold*, 10 Price, 21; 4 Exch. Rep., 266. It is supposed, however, that inasmuch as the contract was by parol, the *construction* of the contract was a matter wholly for the consideration of the jury. If by construction be meant the ascertainment of the agreement of the parties, the proposition is admitted; but if thereby be meant the ascertainment of the *effect* of the agreement, then, we apprehend, the proposition is erroneous. The *effect* of a contract is a question of law. Where a contract is wholly in writing, and the intention of the framers is, by law, to be collected from the document itself, there the entire construction of the contract—that is, the ascertainment of the intention of the parties as well as the effect of that intention, is a pure question of law, and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol the terms of the agreement are, of course, a matter of fact, and if those terms be obscure or equivocal, or susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed: but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written instrument.

The propriety of the nonsuit depends on the effect of the terms of the agreement as offered in evidence. There is nothing in the terms employed ambiguous or equivocal, and if there were there is no suggestion that the ordinary meaning was not the meaning of the parties. The judge, therefore, had a right to declare the legal effect of an agreement in those terms, and the verdict being,

by the assent of the parties, taken subject to his judgment thereon, the matter thus referred to him was a pure question of law.

The plaintiff, under the circumstances of the case, was not, in our opinion, entitled to recover upon the common count for work and labor done. The liability of the defendants was founded *solely* upon their special agreement. The change, by mutual assent in respect to *some* of the specifications of the work to be done under that agreement, left the agreement in full force as to all its other parts.

Whether the plaintiff might not obtain compensation in some forum, in case the acceptance by the commissioners was rendered impossible by accident, or may not be entitled to redress in some form, if that acceptance has been withheld maliciously, or by fraudulent combination, we are not called upon to determine. It is enough for us to say that upon the agreement alleged, the defendants are not liable, because by that agreement their liability was made to depend on the judgment of the commissioners that the work had been done according to the specifications.

Judgment reversed.

(235) ZALESKI v. CLARK,

44 Conn., 218, 26 A. R., 446—1876.

This was an action to recover the price of a bust, which the defendant refused to accept and pay for.

CARPENTER, J. Courts of law must allow parties to make their own contracts, and can enforce only such as they actually make. Whether the contract is wise or unwise, reasonable or unreasonable, is ordinarily an immaterial inquiry. The simple inquiry is, what is the contract? and has the plaintiff performed his part of it? In this case the plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she ought to be satisfied with, but to make one that she would be satisfied with. Nor is it sufficient to say that the bust was the very best thing of the kind that could possibly be produced. Such an article might not be satisfactory to the defendant, while one of inferior workmanship might be entirely satisfactory. A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; and undertaking to make one with which she will be satisfied is quite another thing. The former can only be determined

by experts, or those whose education and habits of life qualify them to judge of such matters. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it, he is bound by it. *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass., 136. New trial advised.

For performance subject to the approval of a third person, see *Burgin v. Smith*, 151—561; *Church v. Shanklin*, 95 Cal., 626, 30 Pac., 789, 17 L. R. A., 210; *Webb v. Trustees*, 143—299; *Mercantile Trust Co. v. Hensley*, 205 U. S., 298, 10 Ann. Cas., 572; 6 R. C. L., 956. In contracts to be performed to the satisfaction of the promisee, the distinction is sometimes made that if it is a question of personal taste, actual satisfaction is required, while in a question of utility alone reasonable satisfaction is sufficient. *Hollingsworth v. Colthurst*, 78 Kan., 455, 96 Pac., 851, 130 A. S. R., 382, 18 L. R. A. (N. S.), 741; *Gerisch v. Herold*, 82 N. J. L., 605, 83 Atl., 892, Ann. Cas., 1913 D, 627; 6 R. L. C., 953. Bonds to be issued "to the satisfaction of our attorney," his approval is necessary. *Webb v. Trustees*, 143—299. An agreement by which a bastard child was to stay with the mother to be cared for until the father "became dissatisfied with the manner of its education and treatment," means dissatisfied for reasonable cause. *Frolick v. Schonwald*, 52—427. See also *Haskins v. Royster*, 70—601; *Johnson v. Dunn*, 51—122; *Lane v. Ins. Co.*, 142—55; 24 Am. & Eng. Encyc., 1236; 3 Page Cont., 1390; *Clark Cont.*, 432; 1 L. R. A., 645; 9 Cyc., 618. Unless the contract requires some personal skill, the promisor may have the work done by a third person; as when A agreed to build a boat for B at a certain price, and got C to do the work for less money, B was compelled to pay the agreed price. *Meadows v. Smith*, 44—327.

Sec. 3. Payment.

1. What constitutes a payment.

(236) RHODES v. CHESSON,

44 N. C., 336—1853.

Action of debt. Plaintiff introduced a bond of defendant and proved its execution. Defendant pleaded payment and introduced a witness, who testified that after the bond became due, and before suit, the plaintiff stated to him that he had borrowed notes of the defendant, that he was to pay him again in notes, and that the bond now in suit was to be one of them. At the time the notes were borrowed, no writing was given, and the bond in suit was then due. The court held that this amounted to a payment, and the plaintiff submitted to nonsuit and appealed.

PEARSON, J. The only question is the construction of the contract, and we are to take the terms as stated by the witness. His Honor was of opinion that the legal effect was a payment of the bond sued on. We have come to a different conclusion.

At common law a bond could not be discharged except by an instrument under seal, *eo ligamine quo ligatur*. The statute of Anne allows the plea of "payment." Payment may be made either

in money, or in money's worth; but to amount to a payment, the thing must be done, the money must be paid, or the thing taken as money must be passed so as presently to become the property of the other party. A promise or undertaking to pay either in money or other thing, is not a payment; the contract is executory, whereas payment is executed, a thing done.

When the plaintiff borrowed of the defendant the \$200 worth of notes, the contract was, that he was to return the amount so borrowed in notes, and the "bond now sued on was to be one of them." It is not stated what credit was given, whether a month, six months, or a year; but as a matter of course there was some credit. This is a necessary implication from the nature of the transaction; for why borrow notes, if the plaintiff had at this time other notes, and was then and there ready to repay in such notes? Say the credit was five days, the contract is executory, and the effect of it is, that the defendant relied on the promise of the plaintiff to repay at a future day in other notes, of which the bond now sued on was to be one. No difference is made between the bonds and other notes. If the understanding was that the bond was to be handed over presently as part payment, why is it left on the same footing with the other notes in which the repayment was to be made? The bond was then due, why was it not handed over at the time? or, if the plaintiff did not have it with him, why was it not understood that it should be considered as then paid over, and be handed to the defendant as soon as convenient? According to the terms of the agreement, the bond was put on the same footing with the other notes, and there is no more reason for saying the contract was executed in regard to it, so as to amount to a payment, than there is for saying the same in regard to the other notes.

If there had been any doubt as to the terms of the agreement, it would have been proper to leave the question to the jury, with the necessary instructions; but the evidence as set forth in the record left no question of fact open; and we agree with His Honor that it was his duty to put a construction on the agreement, the terms being fixed by the evidence. Questions of construction are to be decided by the court; and it makes no difference whether the agreement is written or verbal. *Festerman v. Parker*, 32 N. C., 474; *Young v. Jeffreys*, 20 N. C., 357.

Per Curiam. Nonsuit set aside, *venire de novo* awarded.

(237) MOORE v. THOMPSON,

44 N. C., 221—1853.

PEARSON, J. . . . The creditor, without the knowledge or consent of the debtor, enters a credit on the note for the purpose of giving jurisdiction; the debtor has never assented to, or ratified this credit, but has always objected to it. This does not amount to a payment, and the magistrate had consequently no jurisdiction. It is a familiar maxim of law, "No one can make another his debtor without his consent." The converse is equally true. No one can give another a specific article or a sum of money, unless he chooses to accept it; and although in this latter case the acceptance is usually presumed (as it is supposed to be for his benefit), yet there may be reasons why he may not choose to accept it (as in our case), and then the presumption is rebutted. Suppose a creditor whose debt is about being barred by the statute of limitations or the presumption of payment enters a credit, no effect whatever is given to it unless the debtor assents to it. It is said this is like the case of a plaintiff who remits a part of his damages to prevent a variance. There is no analogy; for then the court allows the *remittitur* as an amendment of the record. *State v. Mangum*, 28 N. C., 369; *Fortescue v. Spencer*, 24 N. C., 63, both assume that the case now under consideration would be a fraud upon the jurisdiction.

Payment must be made to the creditor or his authorized agent. *Pool v. Allen*, 29—120; *Shaw v. Williams*, 100—272. Payment must be made in money unless otherwise agreed; the premium on an insurance policy must be paid in money, a payment in clothing to the agent is not valid. *Folb v. Ins. Co.*, 133—179. Payment in Confederate money, tendered and accepted by the creditor in 1862, was a discharge, if the parties were dealing on equal terms. *Hall v. Craige*, 65—51; *Mercer v. Wiggins*, 74—48; see also 22 *Am. & Eng. Encyc.*, 545-547, where numerous cases are cited. Payment by check, which is accepted and retained, is valid. *Sellars v. Johnson*, 65—104; and the creditor must take it as offered. *Kerr v. Sanders*, 122—635; *Cline v. Rudisill*, 126—523; *Wittkowsky v. Baruch*, 127—313; *Ore Co. v. Powers*, 130—152. Payment by a third person is a discharge if accepted as such. *Griffin v. Petty*, 101—380; but whether the payment by a third person is a discharge of the debt as against the debtor, or a purchase for the benefit of the payer, is a question of fact for the jury. *Runyon v. Clark*, 49—52; if payment is made by one of the parties, it is a discharge unless the debt is transferred to a third person. *Sherwood v. Collier*, 14—380; *Tiddy v. Harris*, 101—589. Where the obligation is payable in specific articles, the obligor has the option to furnish the articles or pay the money, unless it appear that the property only was intended, but this option is lost by failure to make delivery or tender on the day specified, and it then becomes a debt payable in money. *Hamilton v. Eller*, 33—276; 22 *Am. & Eng. Encyc.*, 542. To make specific articles payment, they must be received as payment, or by subsequent agreement applied as payment. *Locke v. Andres*, 29—159; *White v. Beaman*, 96—122; *Young v. Alford*, 113—130, 118—215. Counterfeit money is no payment. *Lowe v. Weatherley*, 20—212; *Hargrave v. Dusenbury*, 9—326; *Anderson v. Hawkins*, 10—568. The debtor must seek the creditor, if he is

in the State, unless a fixed place is given; and a remittance by mail is at the debtor's risk unless directed by the creditor to remit in that way. *Coile v. Com. Travelers*, 161—104; 22 Am. & Eng. Encyc., 533. It seems that a payment on Sunday will operate as a discharge, if accepted; but whether it would have the effect to revive a debt barred by the statute of limitations, *quaere*. 22 Am. & Eng. Encyc., 530; it probably would under our law. See Sunday contracts, *ante*. See generally, 3 Page Cont., sec. 1393.

2. Payment by note.

(238) BUGGY CO. v. DUKES,

140 N. C., 393, 52 S. E., 931—1906.

Civil action on contract. Plaintiff and defendant entered into a written agreement by which the defendant was to receive certain buggies on consignment from the plaintiff, and hold them and the notes and other proceeds of sale in trust for the plaintiff. At the time of the execution of this agreement, three buggies were delivered to defendant, which were paid for. Afterwards plaintiff sent other buggies, which it alleges were delivered under the same contract, and for which defendant gave his notes; and that defendant had disposed of these buggies for \$521.97, which he had converted to his own use. The defendant admitted getting the buggies, but denied that they were received under the contract above mentioned, claiming that they had made a new agreement and that he merely gave his notes for the buggies, without any trust or consignment; and he offered judgment for the amount of the notes. The jury found that the buggies were delivered under the original contract, and there was a judgment, and execution directed against the person, from which defendant appealed.

CONNOR, J. Two exceptions to His Honor's ruling were argued in this court. Defendant contends that conceding the fact to be as found by the jury, the acceptance by plaintiff, of the promissory notes for the price of the buggies, merged the original cause of action or, at least, suspended it until the notes are returned or tendered on the trial; that the plaintiff can not retain his promissory, negotiable notes and, at the same time, prosecute an action against him for the recovery of the amount received by him as his agent. This exception was raised by a request to charge the jury. The issue did not involve the controverted proposition; it was directed simply to the question of fact respecting the capacity in which, or the contract under which, the buggies were delivered and received. The question is, however, presented upon the admitted facts considered in connection with the verdict. It is true, as contended by the defendant, that the acceptance of a negotiable security for an open account, suspends the right of action until the maturity of the note, and then if the plaintiff will resort to his original cause of

action, he must surrender the security. The acceptance of the promissory note, unless expressly so agreed upon, will not discharge the original cause of action. The law is well stated in Clark on Contracts, 435 (2 Ed.). "In such a case the position of the parties is that the payee, having certain rights against the other party, under a contract, has agreed to take the instrument from him instead of immediate payment of what is due him, or immediate enforcement of his right of action, and the other party, in giving the instrument, has thus far satisfied the payee's claim, but if the instrument is not paid at maturity, the consideration of the payee's promise fails and his original rights are restored to him. The effect of receiving a negotiable instrument conditionally is merely to suspend the right to sue on the original contract until the instrument matures, and when it matures, and is not paid, to give the right to sue either on it or on the original contract." Norton, Bills and Notes (3 Ed.), 20; *Gordon v. Price*, 32 N. C., 385. The complaint sets out the entire transaction and defendant makes no point of the fact that his promissory notes are not tendered. He simply denies that he received the buggies upon the contract—the jury have found the issue against him. . . . The judgment must be Affirmed.

Giving a note or draft does not pay a debt unless so agreed. *Conner v. Jennings*, 15—90; *Patton v. Atkinson*, 23—262; *Mauney v. Coit*, 86—471; *Walker v. Mebane*, 90—259; *Dobbin v. Rex*, 106—444; *Davis v. Rogers*, 84—412; *Bank v. Hollingsworth*, 135—556; *Ligon v. Dunn*, 28—133; *Bank v. Jones*, 147—419. Successive notes given for the same obligation are cumulative, unless the substituted notes are essentially different in terms. *Bank v. Bridgers*, 98—67. A new note for an antecedent debt retains the same security as the old one, unless there is an intention to discharge. *Hyman v. Devereux*, 63—624; *Bristol v. Pearson*, 107—562; *Joyner v. Stancill*, 108—153; *Terry v. Robbins*, 128—140; *Vick v. Smith*, 83—80; *Collins v. Davis*, 132—106. Giving a bond for the amount due on an account merges the account, or suspends the remedy until the bond is due. *Costner v. Fisher*, 104—392; it is presumed to include all items to that date. *Smathers v. Shook*, 90—484; *Angel v. Angel*, 127—451.

The note of a third person will be an absolute satisfaction if so intended. If passed at the time of contracting the debt, it is presumed to be satisfaction; as to a preexisting debt, it seems to be the other way. *Gordon v. Price*, 32—385; *DeLafield v. Construction Co.*, 118—105. See generally, 22 Am. & Eng. Encyc., 550 to 567; 3 Page Cont., secs. 1397-1399; *Symington v. McLin*, 18—298; *Leschen Rope Co. v. Mayflower Gold Min. Co.*, 173 Fed., 855, 35 L. R. A. (N. S.), 1, and subject note; *Am. Ins. Co. v. McGehee Liq. Co.*, 93 Ark., 62, 124 S. W., 252, 20 Ann. Cas., 855; 30 Cyc., 1194.

3. Application of payment.

(239) LEE v. MANLEY,

154 N. C., 244, 70 S. E., 385—1911.

This is an action for the possession of personal property claimed by the plaintiff under a chattel mortgage executed to him by the defendant. The defendant alleges that the amount still owing on the mortgage was duly tendered to the plaintiff, \$6.59, and pleads this in bar of a recovery. The mortgage was executed on a mare and certain crops to secure a debt of \$100, and afterwards the defendant became indebted to the plaintiff in the sum of \$29, not included in the mortgage. The defendant delivered to the plaintiff a part of the crop on which he held the mortgage, and from which plaintiff realized \$93.41, and which he applied first to the unsecured debt and then to the mortgage debt. In the plea of tender the defendant did not allege nor prove that he had been at all times ready to pay, nor did he pay the money into court. Defendant appealed.

ALLEN, J. . . . Two exceptions are presented by the record. The first is to the charge of the judge as to the application of the payment of \$93.41, which is as follows: "That if plaintiff received the mortgaged property from defendant and sold the same, or retained the said property for his own use, the defendant had a right to direct its application, and if so directed by the defendant, plaintiff would have to credit same to the secured debt; but if defendant failed to direct its application, then plaintiff might apply it to either claim as he saw fit; if neither plaintiff nor defendant applied the payment, then the law would apply it to the most precarious debt—in the case at bar, the unsecured debt;" and the second is to the refusal to give the instruction asked by the defendant, as to the effect of a tender, which is as follows: "That if the jury shall find from the evidence that the defendant was entitled to be credited on the mortgage debt with the peanuts received by the plaintiff, and if the jury shall further find from the evidence that the defendant through his attorney tendered balance due on the mortgage debt before the bringing of this suit, that said tender would be a discharge and release of the mortgaged property, and the jury should answer the first issue, \$6.59, with interest."

The charge given by His Honor is erroneous. The question is fully discussed and the authorities collated in Cyc., vol. 30, p. 1228 *et seq.* The general rule as to the application of payments is that the debtor has the right, in the first instance, to direct the appli-

cation of a payment made to a creditor who holds a secured and an unsecured debt, and that this right must be exercised at the time the payment is made. *Miller v. Womble*, 122 N. C., 139. If the debtor does not exercise the right the creditor may apply the payment to either debt (*Moss v. Adams*, 39 N. C., 43; *Sprinkle v. Martin*, 72 N. C., 92; *Young v. Alford*, 118 N. C., 220); or he may apply a part to one debt and the remainder to the other (*Young v. Alford*, *supra*); and he is not restricted to the time the payment is made. If, however, he makes the application, he can not change it without the consent of the debtor. Cyc., vol. 30, 1239, and note, where many authorities are collected. If neither the debtor nor the creditor makes the application, the law applies it to the unsecured debt. *Miller v. Womble*, *supra*. It was this rule which the judge presiding undertook to enforce, but it has no application to the facts in this record. The payment in this case was a part of the proceeds of the property conveyed in the chattel mortgage, and the creditor knew this. The execution of the mortgage was an application of the property to the payment of the debt secured therein, and this could not be changed without the consent of the debtor. *Bonner v. Styron*, 113 N. C., 32. The plaintiff alleged that the defendant gave his consent, and the defendant denied it. This presented a question for the jury, which was withdrawn by the charge of His Honor.

It would not be necessary to consider the request to instruct the jury as to the effect of a tender, if it was not reasonably certain that the same question will be presented on another trial. We think the judge properly refused to give the instruction. The plea of tender is defective in that, in addition to alleging that he tendered the amount due, the defendant fails to allege that he has at all times since the tender been ready, able, and willing to pay, and in failing to accompany the plea by payment of the money into court; and the evidence in support of the plea is equally defective.

In *Dixon v. Clark*, 57 E. C. L. R., 376, *Wilde*, C. J., announces the rule as follows: "The principle of the plea of tender, in our apprehension, is that the defendant has been always ready (*toujours prêt*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prêt*), but must be accompanied by a *profert in curiam* of the money tendered;" and this is cited with approval in *Bank v. Davidson*, 70 N. C., 122. In *Bilzell v. Haywood*, 96 U. S., 580, it is said that, "To have the effect of stopping interest or

costs, a tender must be kept good," and in *Soper v. Jones*, 56 Md., 503, "A plea of tender, not accompanied by *profert in curiam*, is bad."

In the case of *Parker v. Beasley*, 116 N. C., 1, it is held that an unaccepted tender of the amount due on a debt secured by a mortgage does not discharge the lien of the mortgage, unless the tender be kept good and the money be paid into court, and the same doctrine is affirmed in *Dickerson v. Simmons*, 141 N. C., 330. This last case notes the distinction between a tender made on the day the debt becomes due, called the law day, and one made afterwards, and holds that the first discharges the mortgage, although the plea of tender is not accompanied by payment into court. The principle is different when the rights of a surety, or of one standing in the relation of a surety, are involved. In such case a valid tender unaccepted releases the surety and his property conveyed to secure the debt of the principal, and it is not necessary to pay the money into court to make the plea good. *Smith v. B. & L. Assn.*, 119 N. C., 261.

For the reasons given, there must be a *Venire de novo*.

To the same effect, *Moose v. Barnhardt*, 116—785; *Shoe Co. v. Peacock*, 150—545; *Stone v. Rich*, 160—161; *Fench v. Richardson*, 167—41; *Am. Woolen Co. v. Maaget*, 86 Conn., 234, 85 Atl., 583, Ann. Cas., 1913 E, 889; 30 Cyc., 1227.

In mutual accounts, the items are applied in the order made. *Jenkins v. Smith*, 72—296; *Lester v. Houston*, 101—608. Where several notes, due at different times, are secured by a mortgage, and all are to become due upon default in one, in a sale made after the first one is due the money will be applied to all ratably. *Kitchin v. Grandy*, 101—86. The party pleading payment must prove it. *Harmon v. Taylor*, 98—341.

The creditor may apply an undirected payment only to legal claims. *Armour Packing Co. v. Vin. Bend L. Co.*, 149 Ala., 205, 13 Ann. Cas., 951. In some courts it is held that a creditor may apply an undirected payment to a debt barred by the statute of limitations so as to revive it; but the majority opinion seems to be that while he may apply the payment, it does not revive the debt. *Supply Co. v. Dowd*, 146—191; *Young v. Alford*, 118—215; *McBride v. Noble*, 40 Colo., 372, 13 Ann. Cas., 1202; *Anderson v. Nystrom*, 114 N. W., 742, 13 L. R. A. (N. S.), 1141, 14 Ann. Cas., 54; 16 E. R. C., 193; 14 L. R. A., 208, and note; 2 Am. & Eng. Encyc., 438.

The civil law rule favored the debtor in the application of payment, while the common law favors the creditor. *Clark Cont.*, 437; 2 Am. & Eng. Encyc., 436 *et seq.* See 3 Page Cont., sec. 1402 *et seq.*

Sec. 4. Tender.

(240) PATTON v. HUNT,

64 N. C., 163—1870.

In this action there was a judgment for plaintiff, and defendant appealed.

RODMAN, J. This is an action of covenant, brought on the obligation of the defendant to deliver to the plaintiff, twelve months after the 1st of October, 1864, a certain sum, in good current bank notes on banks in North and South Carolina, for value received. The defendant pleaded a tender of such notes to the plaintiff on the day, and a refusal by him to accept, but did not aver a continued readiness, or make a profert in court. Upon the tender, the case states that the agent of the defendant met the plaintiff and told him, "that he was sent to pay the obligation in South Carolina bank bills, and that at the time he had such notes in his possession," and the plaintiff then refused to accept them. The judge instructed the jury that the offer of payment did not bar the plaintiff's recovery. We do not know whether this instruction was given under an opinion that what was done was insufficient as a tender, or that any tender would be insufficient unless the plea averred a continuing readiness, and was accompanied by a profert. If the alleged tender was insufficient in either point of view, the judge committed no error, and we are compelled, therefore, somewhat to consider both questions. There appears to be a material difference between a plea of tender in an action on a contract to pay money, and one on a contract to deliver specific articles. The first must aver a continued readiness to pay, and bring the money into court. But the contract in this case must be held to be for the delivery of specific articles. Neither when it was made, nor when it became due, were bank bills money; a note payable in them is not negotiable, nor can an action of debt be maintained on it. *Lackey v. Miller*, Phil., 26.

The authorities to which we were referred by the counsel in an action for the nondelivery of specific articles, may be for the defendant, sustain the position, that a plea of tender is sufficient without an averment of continued readiness and without a profert. In 2 Pars. Cont., 164: "If by the terms of the contract, certain specific articles are to be delivered at a certain time and place, in payment of an existing debt, this contract is fully discharged, and the debt is paid, by a complete and legal tender of the articles, at the time and place, although the promisee was not there to receive them, and no action can thereafter be maintained on the contract,

but the property in the goods has passed to the creditor." At p. 167, he says, "Whenever a tender would discharge the contract, it must be so complete and perfect as to vest the property in the promisee, and give him, instead of *jus ad rem* which he loses, an absolute *jus in re*." The articles must be separated so as to be capable of identification as on a sale. A tender of one sheep, in a flock of several, or of ten bushels of grain, in a bulk of more, would be insufficient. *Powell v. Hill*, decided at this term (64—169).

In our opinion, the doctrine thus stated by Parsons rests on sound reasons of justice and convenience. A promisee should not be allowed, by a wrongful refusal to accept the articles for whose delivery he has contracted, to throw on the promisor the burden of continuing to keep them at his own expense and risk. In some cases it has been held after a refusal to accept, the promisor may throw the goods upon the ground, and be no longer liable for them. However this may be, if he keeps them it is as the bailee of the promisee, who is regarded as the owner; if he converts them to his own use, he is liable for the value at the time of such conversion. His situation is certainly different from that of a promisor bound to deliver at all events. . . .

Venire de novo.

LEE v. MANLEY,

Ante (239).

To make a valid tender, the money must be produced, unless production is waived. *North v. Mallett*, 3—151; *Mills v. Huggins*, 14—58; *Smith v. Loan Assn.*, 119—257. When the debtor tendered the money, and the creditor said he had no use for it then, and the debtor decided to keep it longer, he lost the effect of tender. To make a valid tender so as to stop interest, the debtor must be ready, able and willing to pay, and so inform the creditor, and produce the money unless waived. *Terrell v. Walker*, 65—91; *Phelps v. Davenport*, 151—22; *Gaylord v. McCoy*, 161—685; it must be unconditional, unless it be a condition which the debtor has a right to make. *Rives v. Dudley*, 56—126. See 38 Cyc., 137 *et seq.*; 6 E. R. C., 589, 595; 6 R. C. L., 949.

Tender must be kept good by being always ready to pay; and in suit, the money must be paid into court. *State v. Biggs*, 65—159; *Terrell v. Walker*, 65—91; *Cope v. Bryson*, 60—112; *Parker v. Beasley*, 116—1; *Medicine Co. v. Davenport*, 163—294; *DeBruhl v. Hood*, 156—52. Tender of the money stops interest, but a subsequent demand and refusal defeats the plea, and sets interest running again, at least from the demand. *Bank v. Davidson*, 70—118; *Tate v. Smith*, 70—685. Tender must be before suit to bar the action. *Winnigham v. Redding*, 51—26, but if made after suit and money paid into court, it may stop further costs. *Murray v. Windley*, 29—201; *Cope v. Bryson*, 60—112. Tender of principal, interest and costs, before the day of sale, or even on the day of sale, invalidates a sale under mortgage. *Capehart v. Biggs*, 77—261. See also *Taylor v. Brewer*, 127—75.

When the debt is payable on demand, the debtor may tender the amount at any time. *Wooten v. Sherrard*, 68—334. Upon an agreement of compromise, a tender of the amount is valid. *Boykin v. Buie*, 109—501.

Except in contracts for the payment of money, a proper tender of performance discharges the obligation, while the failure to accept performance is a breach of contract for which the party offering to perform is entitled to

damages. Some of these remedies are mentioned in *Patton v. Hunt*, *supra*, and others will be given under the cases for Breach. See *Williston Sales*, 868; 6 R. C. L., 950.

When the promisor is to deliver specific articles, he must tender them at the time and place fixed; if no place fixed, and the articles are cumbrous, he should ask the promisee to fix a time and place for delivery, and must show that he was there ready. *Mingus v. Pritchett*, 14—78; *Blalock v. Clark*, 133—306.

For tender of judgment, see *Revisal*, 860, 861, in Superior Court, and 1471 in justice's court. *Rand v. Harris*, 83—486; *Russ v. Brown*, 113—227.

Whether tender will discharge the lien of a mortgage, see *Lee v. Manley*, *supra*; 20 Am. & Eng. Encyc., 1062.

CHAPTER III.

DISCHARGE BY BREACH.

Sec. 1. By renunciation.

1. Before the time of performance.

(241) HEISER v. MEARS,

120 N. C., 443, 27 S. E., 117—1897.

FAIRCLOTH, C. J. The defendants, retail merchants in Asheville, N. C., on May 21, 1894, contracted with the plaintiff, a wholesale manufacturer of Baltimore, Md., for a lot of shoes to be soon thereafter manufactured and delivered. On May 26, 1894, the plaintiff received written notice from the defendants not to make the shoes, and that the defendants could not take them. At that time the plaintiff "had cut the leather for the uppers preparatory to making the shoes and partly fitted them to the lasts." The plaintiff refused to accept the countermand, finished the shoes and tendered them to the defendants, who refused to receive and pay for them. The plaintiff now sues for the entire contract price. His Honor charged the jury that the measure of the plaintiff's damages was the difference between the contract price and the market value of the goods at the time they were to be delivered. Plaintiff appealed.

In a contract for the sale of specific articles, then in existence and ready for delivery, and the purchaser refuses compliance, the seller has three remedies at his option:

1. To treat the property as his own and sue for damages.
2. As the property of the buyer and sue for the price.
3. As the property of the buyer, and to resell it for him and sue for the difference between the contract price and that obtained on resale.

A contract for specific articles to be thereafter manufactured and delivered is executory, and no title to the article passes until finished and delivered, and the buyer has no title to, or interest in, the material used.

The option, in the instance first above stated, is allowed the vendor, because he is ready to comply and the vendee is guilty of a breach of promise.

When the contract is executory and the buyer countermands his order, that is notice to the other party that he elects to rescind his

contract and submit to the legal measure of damages, which must result from every breach of contract.

We think His Honor gave the jury proper instruction, except that he should have said, "at the time of the breach," instead of "at the time the goods were to be delivered." That error does not hurt the defendant, as he does not appeal. His Honor properly refused the plaintiff's prayer for special instructions. When the plaintiff was notified of the defendant's rescission of the agreement, it seems unreasonable that the plaintiff should continue to manufacture and thus continue to increase his damages. This conclusion assumes that the title to the shoes never passed, as it could not possibly do, before they were finished and put in the condition contemplated by the contractors. *Benjamin on Sales*, sections 1117, 1121, 860n (9); *Hosmer v. Wilson*, 7 Mich., 294, 303; *Devane v. Fennell*, 24 N. C., 36. This was the only question in the case. Affirmed.

See *Grist v. Williams*, 111—53; *Clothing Co. v. Stadium*, 149—6; *Hawk v. Lumber Co.*, 149—10; *Davis v. Bronson*, 2 N. Dak., 300, 50 N. W., 836, 16 L. R. A., 655, 33 A. S. R., 795; 6 R. C. L., 1029.

(242) BELL v. HOFFMAN,

92 N. C., 273—1885.

Civil action on contract. Plaintiff agreed to sell to defendant the entire stock of goods that he might have in his store on the 1st day of September, to be paid for at "wholesale prices as per invoice from G. Oppenheimer & Son," fixing the terms of payment, and providing for a forfeiture of \$50 for noncompliance on the part of either party, which was secured by individual notes. About 10 o'clock on the day specified, the defendant went to the plaintiff and told him he was ready to comply with the contract and wished to take an inventory; the plaintiff claimed ten percent on the prime cost of the goods; defendant refused to allow this and left. About 2 o'clock of the same day, the plaintiff saw defendant and offered to allow him to take the inventory at prime cost, and defendant declined, saying he had made other arrangements.

This action was brought for the \$50 forfeiture. There was a judgment against the plaintiff for the forfeiture, and he appealed.

MERRIMON, J. The plaintiff failed to comply with the agreement set forth in the record, and, under its provisions, by such default, became indebted to the defendant Hoffman in the sum of fifty dollars secured to him by the plaintiff's promissory note for that sum of money.

At a reasonable hour of the day on which the plaintiff had

agreed to deliver the goods to the defendant named, the latter went to and informed him that he was ready and prepared to comply with the agreement on his part, and desired to take an inventory of the goods. That he was so ready and prepared is not controverted, and that he was, must be accepted as the fact.

The plaintiff "claimed ten percent on the prime cost price of the goods, that this was what wholesale price, as per invoice from G. Oppenheimer & Son, meant," and he then refused to allow the inventory to be taken, declaring that unless Hoffman would allow his demand, he, the plaintiff, "would not trade." Hoffman declined to allow this demand, and left the plaintiff.

There could scarcely be a more palpable breach of the agreement on the part of the plaintiff. He refused to comply with its terms and effect. He made a demand unwarranted by it, and, without reserve or qualification declared to the defendant that he "would not trade" unless the latter would allow his demand. Hoffman was not bound to allow it; he was bound to comply with the agreement as far as he could, and he did so, when he was ready and prepared to comply with its requirements of him and so informed the plaintiff. He was not obliged to wait indefinitely or at all to see if the plaintiff would reconsider his refusal to deliver the goods; he had no reason to believe he would do so, and there is nothing in the agreement that can be reasonably construed to mean that the parties to it, each, should have all the first day of September, 1882, in which to decide whether or not he would comply with its requirements of him; on the contrary, it was expressly stipulated that, in case of noncompliance with it by either party, the non-complying party should pay the other fifty dollars.

The plaintiff was bound to comply with the agreement according to its legal effect; he failed to do so at his peril; and his failure and refusal to deliver the goods on the day specified, was noncompliance with it. His claim that *ten per centum* should be added to the prime cost price of the goods was obviously unfounded. The plain terms of the agreement left nothing to doubt, the prices to be paid were fixed, and they were the "wholesale prices as per invoice from G. Oppenheimer & Son." Any question as to prime cost and ten per centum added thereto was outside of and foreign to the agreement.

It seems that the plaintiff thought so himself, for afterwards, on the same day, he proposed to abandon his demand. This proposition came too late; several hours before he made it he had refused to comply with the agreement; one flat refusal was enough; this entitled the defendant to the forfeiture of \$50, and relieved him from all obligations to take the goods at any price. . . .

There is no error of which the plaintiff has the right to complain, and judgment must be entered for the defendant. Judgment accordingly.

(243) ROEHM v. HORST,

178 U. S., 1, 44 L. Ed., 953—1899.

This was an action for the breach of four several contracts for the sale of hops, extending over five years; Roehm refused to accept the hops when offered, and notified Horst that he would not take any in the future, and Horst brought suit. From a judgment for Horst, Roehm appealed.

FULLER, C. J. . . . The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. . . .

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract and recover accordingly. And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture and sale of goods. The cases are extensively commented on in the notes to *Cutter v. Powell*, 2 Smith Lead. Cas., 1212, 1220. . . .

In *Hochster v. De la Tour*, 2 El. & Bl., 678, plaintiff, in April, 1852, had agreed to serve defendant, and defendant had undertaken to employ him, as courier, for three months from June 1, on certain terms. On the 11th of May, defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. Thereupon, on May 22, plaintiff brought an action at law for breach of contract in that defendant, before the said 1st of June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage. And it was ruled that as there could be a breach of contract before the time fixed for performance, a

positive and absolute refusal to carry out the contract prior to the date of actual default amounted to such a breach.

In the course of the argument, Mr. Justice *Crompton* observed: "When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use of my liberty.'" . . .

In *Frost v. Knight*, L. R. 7 Exch., 111, defendant had promised to marry plaintiff so soon as his (defendant's) father should die. While his father was yet alive he absolutely refused to marry plaintiff, and it was held in the exchequer chamber . . . that for this breach an action was well brought during the father's lifetime. *Cockburn*, Ch. J., said: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour*, 2 El. & Bl., 678, and the *Danube & B. S. Rwy. & K. Har. Co. v. Xenos*, 13 C. B. N. S., 825, on the one hand, and *Avery v. Bowden*, 5 El. & Bl., 714; *Reid v. Hoskins*, 6 El. & Bl., 953, and *Barrick v. Buba*, 2 C. B. N. S., 563, on the other, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party, as the wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." . . .

The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, although the

precise point has not been ruled by this court. (The court then quotes from *Smoot's Case*, 15 Wall., 36; *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S., 264; *Dingley v. Oler*, 117 U. S., 490; *Cleveland Roll. Mill v. Rhodes*, 121 U. S., 255; *Anvil Min. Co. v. Humble*, 153 U. S., 540; *Pierce v. Tenn. Coal, I. & R. Co.*, 173 U. S., 1. The rule is disapproved in *Daniels v. Newton*, 114 Mass., 530, and in *Stanford v. McGill*, 6 N. D., 536, 72 N. W., 938, 38 L. R. A., 760.) . . .

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. *Hinckley v. Pittsburgh Bes. Steel Co.*, 121 U. S., 264. . . . Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party can not complain. . . . Judgment affirmed.

Only a part of the discussion in the above case is given. *The Lake Shore & Mich. R. R. v. Richards*, 152 Ill., 59, 30 L. R. A., 33; *Wester v. Casein Co.*, 206 N. Y., 506, 100 N. E. 488, Ann. Cas., 1914 B, 377; *Brady v. Oliver*, 125 Tenn., 595, 147 S. W., 1135, Ann. Cas., 1913 C, 389; 6 R. C. L., 1023.

See also *Grandy v. Small*, 50—50. The party relying upon a renunciation must show it unmistakably, and that he accepted it and acted upon it. *Sit-terding v. Grizzard*, 114—108; *Faw v. Whittington*, 72—321; *Holden v. Purefoy*, 108—163. As to what amounts to renunciation, see *Dingley v. Oler*, 117 U. S., 490; *Clark Cont.*, 444; 7 Am. & Eng. Encyc., 150; 3 Page Cont., secs. 1436-1442; 9 Cyc., 635; 30 L. R. A., 1; *Register Co. v. Hill*, 136—272.

2. During the time of performance.

(244) THIGPEN v. LEIGH,

93 N. C., 47—1885.

Civil action to enforce an agricultural lien. One Riddick, a cropper on the land of defendant, made an agricultural lien to F. L. Thigpen, who afterwards assigned it to J. R. Thigpen, the plaintiff. The cropper abandoned his crop in June, leaving it in bad condition; the defendant notified the plaintiff to cultivate the crop as the cropper was to do, and he refused to do so, but told defendant to cultivate the crop and pay the expenses out of it;

defendant said, "If I do, you shall not have a cent of it." The defendant harvested the crop, and after paying the rent and the actual expense, had \$56 over. Plaintiff sued for this amount. There was a judgment for plaintiff, and defendant appealed.

ASHE, J. We think that the plaintiff had no right to this balance. We are unable to find any authority in point, and the learned counsel who appeared before us for the defendant, expressed their inability to find any. We are therefore compelled to decide the case upon general principles of law and justice.

We start out with the proposition that Riddick, the cropper of the defendant, having abandoned the crop in violation of his contract, was without remedy against the defendant. For "where there is an entire contract, and the plaintiff has performed a part of it, and without legal excuse and against the consent of the defendant has refused to perform the remaining part, he can not recover anything for the part performed." *Niblett v. Herring*, 49 N. C., 262; *Dula v. Cowles*, 52 N. C., 290. Every agreement made by the owner of land with one to cultivate his land as a cropper, must necessarily be a special contract, and when that is so, neither party to the contract, under the former practice, could recover on what was called in the former system a *quantum meruit*, when it is made to appear that he has against the consent of the other party wilfully refused to perform his part of the agreement. *Winstead v. Reid*, 44 N. C., 76.

These authorities go to show that Riddick, by the wilful abandonment of the crop in the month of June, against the consent of the defendant, has lost all right to it. To whom, then, did it belong? Of course to the defendant, the landlord, who was entitled to his rent, and who cultivated the crop to its maturity, unless J. R. Thigpen, by his advancement to Riddick, the cropper, acquired such a lien on the crops as would entitle him to be paid thereout, subject to the superior lien of the defendant as landlord.

This brings us to the inquiry, what interest in the crop does the lien of agricultural advancements give to him who makes them? What is the definition of a lien? It is simply the right to have a demand satisfied out of the property of another. The lien for advancement differs nothing in its nature and operation from that of a judgment which has been held to constitute no property in the land of the debtor, only a right to have the judgment satisfied out of the land to which the lien had attached. *Dail v. Freeman*, 92 N. C., 351, and the authorities there cited in support of the principle. The principle must apply to personalty as well as to realty, whenever a lien is created.

Apply the principle to our case. Thigpen, by his advancements to Riddick, who was a cropper, acquired no right of property in

the crop planted and cultivated by him, but only the right to have his advances repaid out of that part of the crop that might fall to Riddick's share thereof, on a division between him and the defendant. But Riddick, by his abandonment of the crop and his failure to perform his part of the contract, had lost his interest in and all right to a division of it. There was then nothing left upon which the lien of Thigpen could operate, and out of which his demand could be satisfied. Riddick's right to a share of the crop having ceased, Thigpen's lien on the share necessarily ceased with it.

Every person making agricultural advancements to a cropper must rely in a great measure upon his good faith in carrying out his contract with his landlord, for he must know that the cropper has it in his power to desert his crop and leave it uncultivated, and therefore, in taking the lien he knowingly assumes the risk.

Aside from this view of the law, the justice of the case is with the defendant. Upon the abandonment of the crop by the cropper he informed the plaintiff, who, as assignee, stood in the shoes of him who made the advances and told him to go on and make the crop, which he refused to do, and threw the trouble and burden of finishing it upon the defendant, who expressly advised him, if he did so, he should not have one cent.

Our conclusion is there was error. The judgment of the Superior Court is therefore reversed, and a *venire de novo* awarded.

(245) SMITH v. LUMBER CO.,

142 N. C., 26, 54 S. E., 788, 5 L. R. A. (N. S.), 439—1906.

The plaintiff sued for \$150, upon a contract of service. On February 5, defendant employed plaintiff for four months at \$75 a month; at the end of the first month he paid the plaintiff for the month's work, and discharged him without cause. The plaintiff tried to get other work for the three months, but failed. Plaintiff sued on the 5th of May for the second month's wages, and recovered judgment; and now sues for the other two months' wages. Judgment for plaintiff, and defendant appealed.

WALKER, J. (After holding that since the plaintiff's term of service began on February 5, the third month ended on May 4, the salary for the third month would be included in the judgment rendered in the action brought on May 5, for the second installment, proceeds.)

The defendant also contended that the plaintiff could not sue on the successive installments as they fell due, but must sue on a *quantum meruit* or for damages for the breach of the contract, and that his recovery for the one installment was a complete sat-

isfaction of all damages arising from the breach of the contract, as his recovery in either of the other two forms of action would have been. We do not assent to this proposition in its entirety. Numerous and well-considered authorities hold, in accordance with what we consider the correct principle and the better reason, that when the contract is entire and the services are to be paid for by installments at stated intervals, the servant or employe who is wrongfully discharged has the election of four remedies: 1. He may treat the contract as rescinded by the breach, and sue immediately on a *quantum meruit* for the services performed; but in this case he can recover only for the time he actually served. 2. He may sue at once for the breach, in which case he can recover only his damages to the time of bringing the suit. 3. He may treat the contract as existing and sue at each period of payment for the salary then due. (We do not consider the right to proper deduction in this case, as it is not now presented.) 4. He may wait until the end of the contract period and then sue for the breach, and the measure of damages will be *prima facie* the salary for the portion of the term unexpired when he was discharged, to be diminished by such sum as he has actually earned or might have earned by a reasonable effort to obtain other employment. The rule as thus stated is supported by the great weight of authority: 14 A. & E. Enc. (1 Ed.), 797; 20 *Ibid.* (2 Ed.), 36 *et seq.*; and it is clearly recognized and adopted by this court in *Markham v. Markham*, 110 N. C., 356. The difficulty in establishing the right to sue upon the contract for the whole amount of the wages originated in the doctrine of "constructive service." The law, in theory at least, required that the servant wrongfully dismissed before the expiration of his term must keep himself in readiness at all times to perform the required service, and an averment that he had done so was necessary in an action on the contract for a breach. By a fiction of law his constant readiness to perform was considered equivalent to actual service, so as to enable him to recover the full amount of the wages, the same as if the service had been actually performed, and it was so construed by the courts. But this principle was inconsistent with the rule as to the measure of damages, which permitted the master to show in diminution of the servant's recovery for wages that the latter either obtained or could have obtained other employment, inasmuch as to be always strictly ready he must be always idle. The two requirements of the law could not reasonably and logically co-exist, and for this reason the doctrine of constructive service, first asserted by Lord Ellenborough in *Gandell v. Pontigney*, 4 Camp., 375, was repudiated in later cases and the servant's remedy was restricted to either a *quantum meruit* (if he elected to rescind the

contract) or an action for the damages resulting from the breach, and his right to an action for the wages, treating the contract as constructively performed was denied. *Goodman v. Peacock*, 15 Q. B., 74; *Cutter v. Powell*, 2 Smith L. C., 1245; 20 A. & E. Enc., 40. This court recognized the doctrine of constructive service in *Hendrickson v. Anderson*, 50 N. C., 246, and *Brinkley v. Swicegood*, 65 N. C., 626, to the extent of expressly asserting the right of the servant to recover the full amount of the wages for the unexpired portion of the term, provided his action is brought after the end of the term, even though there had been no actual service during that time. . . . He could not recover these damages before the expiration of his term because of the other rule, that the master is entitled to diminish them by the amount he may or could have received from other employment, which can not be determined until the full period is at an end. (The court granted a new trial unless the plaintiff would remit the amount for the third month, which was held to be included in the former judgment.)

In addition to the cases cited above, see *Harris v. Separk*, 71—372; *Oldham v. Kerchner*, 79—106; 6 R. C. L., 1023; *Mord. & Mc. Rem.*, 549; 20 Am. & Eng. Encyc., 24, 36, where it is said that the action may be upon the *quantum meruit*, or for breach of contract, and on page 40 where the “constructive service rule” is discussed and *Markham v. Markham* cited as an instance, while the weight of authority is given the other way. As to measure of recovery, it seems to be governed by the contract price. *Hobbs v. Riddick*, 50—80; *Jones v. Mial*, 89—89; but see *U. S. v. Behan*, 110 U. S., 338; 30 L. R. A., 33, and note; 27 L. R. A., 409. See also cases under next section and under entire and divisible contracts, *post*; 15 Am. & Eng. Encyc., 1087; 20 *Ibid.*, 30; 9 Cyc., 688.

3. Impossibility created by act of one of the parties.

(246) *BUFFKIN v. BAIRD*,

73 N. C., 283—1875.

The plaintiff claiming one-fourth interest in certain lands, offered to sell the same to the defendants, but defendants not being willing to buy so small an interest, said they would buy as much as three-fourths if plaintiff could get it. The plaintiff bound himself in writing to get a good title to three-fourths interest in the land for the defendants, within 100 days, for \$3,300; and the defendants bound themselves to take the said interest at that price and within that time. The plaintiff proceeded at once to try to get the title, employing counsel and incurring other expense, but stopped all attempts when he learned that the defendants within a few days after the contract had actually purchased the one-half interest which the plaintiff was trying to get. The defendant later purchased the other half interest, paying for the whole \$2,000.

The plaintiff sued for violation of the contract, and alleged that he was entitled to the difference between what defendants were to pay him for the land and what they actually paid for it. Upon a verdict there was a judgment for the plaintiff for \$1,800, and defendants appealed.

RODMAN, J. The two writings executed by the plaintiff and the defendants, respectively, formed a single contract, by which the plaintiff was bound to convey to the defendants a good title to three-fourths of the Sawyer land within one hundred days, and the defendants were bound on receiving such title to pay the plaintiff \$3,300.

[The court then shows that the question of fraud or mistake is not material to the case.]

Is it clear that the conveyance of a good title to three-fourths of the land by plaintiff, or a tender of a conveyance, was a condition precedent to the liability of the defendants to pay him the sum stipulated for? If a person contracts to do a certain entire act, for which he is to receive a certain sum, he can not recover the price as upon a complete performance, notwithstanding it was prevented by inevitable accident. *Cutter v. Powell*, 1 Smith L. C., 1, and notes; *Appleby v. Myers*, E. L. R., 2 C. P.; *Young v. Jeffreys*, 20 N. C., 357; *White v. Brown*, 47 N. C., 403; *Brewer v. Tysor*, 48 N. C., 180; *Mizell v. Burnett*, 49 N. C., 249; *Niblett v. Herring*, *Ib.*, 262; *Dula v. Cowles*, 52 N. C., 290.

The complaint, however, is not framed upon the idea that the plaintiff is entitled to recover upon the express contract. The plaintiff contends that there results from the express terms of the contract a promise by defendants that they will do nothing within one hundred days to prevent plaintiff from performing his part of the contract, for the breach of which he is entitled to damages. It can not be doubted that when a party to a contract (as the defendant in the present case), by his fault or wrong, prevents the other from fully performing his part of the contract, the party thus in fault can not be permitted to take advantage of his own wrong and screen himself from payment for what has been done under the contract. 2 Pars. Cont., 523. But the defendants in the present case do not admit that by their contract they restricted themselves from buying the land in question for any time whatever. They argue that it is no more than if they had made a contract with the plaintiff for the delivery to them of a quantity of corn, within a certain time, for a certain price, which would not prohibit them from offering a higher price for other corn, although the incidental effect might be to raise the price, and perhaps throw a loss on the plaintiff. We think, however, the cases are not analogous, and that there was an implied contract on the part of the

defendants to do nothing within the hundred days to prevent the plaintiff from buying the land. This was held in the case of *Marshall v. Craig*, 1 Bibb (Ky.), 379. It is clear, upon common sense and numerous authorities, that inasmuch as the defendants made it impossible for the plaintiff to comply with his contract, they discharged him from it, and would not be entitled to recover anything from him by reason of his failure to perform. Com. Dig., condition, L., 6.

We think it follows from what has been said that the plaintiff is entitled to recover *some* damages from the defendants by reason of their injurious interference. We have found it more difficult to say what should be the measure of damages. This is a question of law, although the jury must apply the rules of law to the facts, if they be in dispute. His Honor, the judge below, was of opinion that the plaintiff was entitled to recover the difference between what defendants actually paid for three-fourths of the land and what they had agreed to pay plaintiff for it, thus putting the plaintiff in the situation he would have been in if, without trouble or other expense, he had bought within the hundred days, at the price at which defendants bought.

Expressions may be found in the text-books to the effect that if one party be prevented from performing his contract by the act or default of the other, he is in the same condition as if he had performed it. But an examination of the cases (so far as I have been able to examine them) will show that this doctrine applies only:

1. To protect the party failing to perform from an action by the party preventing him.

2. Perhaps, also, in cases where the plaintiff has agreed to do work or furnish materials which defendant has prevented being fully done, and the like cases in which it was certain that but for the unlawful act or default of the defendant the contract could have been performed, and the labor and expense of the plaintiff in performing it could be calculated from certain *data*, and consequently his profits upon performance, which may thus not unjustly be made the measure of damages. *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.), 61; *Sedgwick Dam.*, 223; *Bingham v. Richardson*, 60 N. C., 215.

3. And to cases in which the plaintiff has substantially, although not literally, performed his contract, as in *Ashcraft v. Allen*, 26 N. C., 96.

Whatever may be said of such cases, we think that this rule will not apply to a case like the present. It is impossible to say with certainty that the plaintiff would or could have bought the land at the price at which defendants bought it, and within the time allowed him; and also what would have been his expense and labor

in doing so. The owners might have refused to sell at all, or refused except at a price greater than the plaintiff was to receive, or might have died before selling, in which case the contract by its terms was to have no effect. The damage would have to be calculated as under the conditions existing at the time of the breach of defendants' contract, and the success of the plaintiff at that time was subject to contingencies which did not admit of a certain calculation. His anticipated profits were merely precarious and speculative, and it can not be said with certainty that he has sustained any damage beyond the value of his labor and expenses. To give to the plaintiff the full benefit of the defendants' purchase, as if made by the plaintiff, would be to give him the benefit of the defendants' labor, skill and good fortune without exertion on his part. It may be useful, too, to observe what damages the defendants could have recovered of the plaintiff in case he had failed to procure a title without the excuse of an act of theirs. They could not have recovered the difference between what they were to pay the plaintiff and any greater price which they might have paid. The authorities are that where a vendee has paid nothing, he can, in general, recover nominal damages only, upon an inability in the vendor to make title. Sedgwick Damages, 183; Flurean v. Thornhill, 2 W. Bl., 1078; Worthington v. Warrington, 8 Man. Gr. & S., 133; Hopkins v. Grazebrook, 6 Barn. & Cres., 31; Robinson v. Harmon, 1 Ex., 850; Allen v. Anderson, 2 Bibb., 415. Nichols v. Freeman, 33 N. C., 99, does not resemble the case supposed.

In the present case the plaintiff is entitled to recover for his labor and expense in endeavoring to perform his contract, as upon a *quantum meruit*. Such, we think, is the rule established by the modern authorities. 2 Pars. Cont., 523.

In Planche v. Colburn, 8 Bing., 14, the plaintiff had agreed to write a treatise on ancient armor, to be published by defendants in a serial publication called the Juvenile Library. Defendants were to pay plaintiff 100 pounds for the work. The plaintiff had prepared about one-half his work, and had incurred some expense, when defendant abandoned his serial publication, and refused to receive the treatise of the plaintiff, or to pay him any part of the compensation. It was held that the plaintiff was entitled to recover, not the price of the treatise as if he had completed it, but upon a *quantum meruit* for the labor he had done, which the jury had found to be 50 pounds.

Similar in principle to this are the numerous cases which hold that where a plaintiff who has been employed for a year, at a yearly sum, has been wrongfully dismissed during the year, he can not recover the whole year's wages, as if he had served during the whole year, but only for the service actually performed, and in

some cases with an addition of damages by reason of inability to find other employment. The statement doubtfully made in Smith's notes to *Cutter v. Powell*, 1 Smith L. C., 1, that *perhaps* a servant wrongfully dismissed might wait until the end of the year and recover as upon a constructive service, has not been approved in England or in the United States. *Goodman v. Pocock*, 15 Ad. & El. (2B.), 576; *Ellerton v. Emmons*, 6 Man. Gr. & S., 178 (60 E. C. L. R.); *Woodley v. Bond*, 66 N. C., 397; *Alges v. Alges*, 10 Serg. & Rawle, 225. In this last case the language of *Gibson, J.*, is so terse as to deserve quoting:

"Here the plaintiff below claimed to recover for the whole time for which he had been employed, on the ground that an act the performance of which has been prevented by the person for whose benefit it was to be performed, shall, as to him, be taken to have been actually performed. This holds so far as to give an action on the contract where actual performance would otherwise have been a condition precedent, but not to create an implied promise to compensate the party as if the act were actually performed." See, also, *Perkins v. Hart*, 11 Wheat., 237. There was error in the instruction of His Honor.

Per Curiam.

Venire de novo.

See note to preceding case. Where A agreed to support B for certain land conveyed to him, and was prevented from doing so by the heirs of B; A was discharged from such performance, and the heirs of B could not afterwards claim the land for such nonperformance. *Harwood v. Shoe*, 141—161. See in addition to the cases cited above, *McMahan v. Miller*, 82—317; *Winstead v. Reid*, 44—76; *Harris v. Wright*, 118—422; *Nav. Co. v. Wilcox*, 52—481; *Whitlock v. Lumber Co.*, 145—120; 15 Am. & Eng. Encyc., 1090; *Oldham v. Kerchner*, 79—106; 28 Am. Rep., 302; 9 Cyc., 639; 1 *Parson's Cont.* (9 Ed.), 581; *Conservatory v. Dickinson*, 158—207; *Parker v. Macomber*, 17 R. I., 674, 24 Atl., 464, 16 L. R. A., 858; 6 R. C. L., 1012, 1020.

Sec. 2. Failure of performance.

1. Entire contracts.

(247) *BREWER v. TYSOR*,

48 N. C., 180—1855.

Action of *assumpsit*. The plaintiff declared on special contract and also for work and labor done. The plaintiff agreed in writing to make a race three feet deep and four feet wide, between certain points, within five months, for \$250. There was evidence of a subsequent modification of the contract, giving the plaintiff the option to make the race, or to cut it part of the way and build a dam. The plaintiff did not cut the race according to the specifications, in that it was not three feet deep, and only laid the foundation of the dam, and then abandoned the work. The defendant

did some more work on the race and built the dam and used it. He had paid the plaintiff \$140, and plaintiff sued for the balance due or for the value of the work done. There was a judgment for plaintiff, and defendant appealed.

NASH, C. J. The contract is a special one, executory in its character and entire. It is admitted that the plaintiffs can not recover on the special count; neither can they on the merits of the case on the *quantum meruit*. The contract being an entire one, performance on the part of the plaintiffs was a condition precedent, necessary to be averred in the declaration, and proved as averred, unless the other contracting parties have discharged them from the performance. If the plaintiffs do not aver performance, or a readiness to perform, they can recover, neither on the special contract, nor on the *quantum meruit*. *Winstead v. Reid*, 44 N. C., 76; *Cutter v. Powell*, 6 T. R., 320; *White v. Brown*, 47 N. C., 403. The contract in this case was, that the race should be completed in five months after the date of the contract, of a certain length, depth and breadth. A portion only of the race was cut; and, after working three months, the plaintiffs abandoned the work, and it was completed by the defendant. Here, time was of the essence of the contract, and the plaintiffs failed to bring themselves within it. It is said the plaintiffs were sick most of the time, and are, therefore, to be excused, under the maxim, *actus Dei nemini facit injuriam*; but the sickness of the plaintiff did not render it impossible for them to execute the contract, as they might and ought to have procured the work to be done.

It is again said that the defendants received the work as it had been executed, and, therefore, they are bound under the second count. The reply is, that the work which the plaintiffs had contracted to do was necessary to the enjoyment, by the defendants, of the property to which it was appurtenant, to wit, the mill; that the defendants were obliged to use that portion of the race dug by the plaintiffs, in order to put their mill into operation; it could not be removed, nor could it be cut in any other place, to answer the purpose for which it was intended. If such was the fact, it was incumbent on the plaintiffs to have shown it. We do not think that case comes within the principle, that where there is a special contract for work to be done, and it is done, but not in accordance with the contract, and is received by the person for whom it is executed, he shall pay, not on the special contract, but on a *quantum meruit*. Here the work was but partially done and the plaintiffs abandoned it before completion. As to the conversation between the parties, at the time demand of payment was made, it can, in no sense, sustain the second count in the declaration. There was, on the part of the defendants, an express denial of any

liability; for they asserted that they had paid the plaintiffs more than their work was worth. There was, in fact, no acceptance by the defendants of the work done. There was error in the charge.

Per Curiam. Judgment reversed, and a *venire de novo* awarded.

See *Thigpen v. Lee*, *supra*, and note; other cases to same effect not cited above, *Dover v. Plemmons*, 32—23; *Lane v. Phillips*, 51—455; *Russell v. Stewart*, 64—487; *Kelly v. Oliver*, 113—442; *Dula v. Cowles*, 47—544; 49—519; 52—290; 75 A. D., 463; *Cuthbert v. Kuhn*, 3 Wharton, 357, 31 A. D., 513; *Bentley v. Edwards*, 123 Minn., 179, 146 N. W., 347, 51 L. R. A. (N. S.), 254; *Huyett & Smith Co. v. Chic. Edison Co.*, 167 Ill., 233, 59 A. S. R., 272; *Leopold v. Salkey*, 89 Ill., 412, 31 A. R., 100; 6 R. C. L., 972, 974. A contract to support one for land conveyed is an entire contract, *Andres v. Andres*, 122—352; *Tussey v. Owen*, 139—457. In *Gorman v. Bellamy*, 82—496, it is said the courts are inclined to relax the common law rule and allow a recovery for benefits conferred. In *Brewer v. Tysor*, before the court again in 50—173, the facts showed a severable contract and the plaintiff could recover for the part performed.

(248) CHAMBLEE v. BAKER,

95 N. C., 98—1886.

Action on *quantum meruit* for services rendered. Plaintiff was hired by defendant in February, to work on the farm for the balance of the year at \$10 a month, the contract to be an entire one for the remainder of the year. He worked until September, and left without excuse, and defendant sustained no damage by his leaving. His work amounted to \$70, and he had been paid \$20. There was a judgment for plaintiff, and defendant appealed.

SMITH, C. J. The appellant insists that the contract being special, for labor for the entire residue of the year, though the compensation is measured by months, that the plaintiff having left before the expiration of the time "without legal excuse," can not recover for the partial service performed.

The general rule is thus laid down, and is sustained by numerous adjudications, cited in the American Editor's Notes to the case of *Cutter v. Powell*, 2 Smith's Leading Cases, 1: "But if there has been an entire executory contract, and the plaintiff has performed a part of it, and then wilfully refuses, without legal excuse, and against the defendant's consent, to perform the rest, he can recover nothing, either in general or special *assumpsit*."

The same rule has been repeatedly recognized and acted on in this court, the more recent cases, wherein reference to others may be found, being *Thigpen v. Leigh*, 93 N. C., 47, and *Hester v. Lawrence*, *Ibid.*, 79.

Indeed, so stringent was the former practice, that in an action upon a special contract to pay for services to be rendered, and which were rendered, no evidence in defense or to reduce the recovery, was admissible to prove inattention, neglect, wasted time

or other misconduct of the plaintiff, and dereliction in the undertaken duty, and the defendant was driven to a separate action for redress. *Hobbs v. Riddick*, 50 N. C., 80.

It is otherwise under the present system, and the entire dispute, involving opposing demands, is now adjudged in a single suit. This is some relaxation of the doctrine regarding special contracts, and the enforcement of the obligations they create.

The manifest injustice upon such technical grounds, of refusing all compensation for work done and not completed, or for goods supplied short of the stipulated quantity, and of allowing the party to appropriate them to his own use, without paying anything, has been often felt and expressed by the judges, and a mode sought by which the wrong could be remedied.

The mischief is adverted to by this court in *Gorman v. Bellamy*, 82 N. C., 496, when referring to the cases of *Dumott v. Jones*, 23 How. (U. S.), 220, and *Monroe v. Phillips*, 8 Ellis & Black, 739, this language is used: "The inclination of the courts is to relax the stringent rule of the common law, which allows no recovery upon a special unperformed contract, nor for the value of the work done, because the special, excludes an implied contract to pay. In such case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. Accordingly, restrictions are imposed upon the general rule, and it is confined to contracts entire and indivisible, and when by the nature of the agreement, or by express provision, nothing is to be paid till all is performed."

If, by the terms of the agreement, certain sums are due on performance of certain parts of the work, thus severing the consideration, separate actions are maintainable for each. And in the construction of the agreement, the court will be guided by a respect to general convenience and equity, and the reasonableness of the particular case.

Thus, the modified rule has been declared to be, that though the consideration and contract be entire by the apparent terms of the agreement, yet such may be the circumstances, as to entitle the plaintiff to a ratable compensation for part performance.

So, the inference that the compensation is payable in installments at certain periods, as weekly or monthly, according to the service, unless there is a clear and distinct understanding that compensation, as a unity, is demandable only at the expiration of the full period of service.

These views are presented in the able discussion in the note from which we have extracted a part, and rest upon a series of adjudications cited.

In our case, the plaintiff's wages are measured by monthly sums,

and for two months of his work he has received full compensation. This indicates an understanding between the parties that the wages were to be paid as the work progressed, and the plaintiff's necessities may have required, that he should not be delayed until the end of the year.

The defendant loses nothing by the plaintiff's leaving, nor is it stated that the departure was against the defendant's will. Under these circumstances, and to avoid manifest injustice, we hold the ruling to be right and that there is no error. The judgment must be affirmed.

No error.

Affirmed.

The distinction in the above cases shows the difference between special contract and implied contract. The law presumes a promise only when it does not appear that there is any special agreement between the parties. For if there is a special contract which is still open and unrescinded, embracing the same subject-matter with the common counts, the plaintiff, though he should fail to prove his case under the special count, will not be permitted to recover upon the common counts. *Lawrence v. Hester*, 93—p. 81; *Carter v. McNeely*, 23—448; *Dula v. Cowles*, 47—454, and 52—290; *Winstead v. Reid*, 44—76; *White v. Brown*, 47—403; *Brewer v. Tysor*, 48—180; *Niblett v. Herring*, 49—262; *Russell v. Stewart*, 64—487; *Ducker v. Cochrane*, 92—597; *Thigpen v. Leigh*, 93—47; *Wall v. Williams*, 93—327; *Lindsay v. Ins. Co.*, 115—212; *Wilmington v. Bryan*, 141—p. 672. In *Chamblee v. Baker*, 95—98, the distinction is limited to special contracts which are entire and indivisible, and this has been approved in *Booth v. Ratcliffe*, 107—6; *Wooten v. Walters*, 110—251; *Markham v. Markham*, 110—356; *Coal Co. v. Ice Co.*, 134—579; *Tussey v. Owen*, 139—457; *Willis v. Construction Co.*, 152—100; *Jones v. Sandlin*, 160—150; *Pullen v. Green*, 75—215; *Raby v. Cozad*, 164—287; *Timberlake v. Thayer*, 24 L. R. A., 234.

Under the Code practice an action may be brought on a special contract and recovery had on an implied contract if the facts alleged are sufficient. *Jones v. Mial*, 82—252; *Lewis v. R. R.*, 95—179; *Stokes v. Taylor*, 104—394; *Fulps v. Mock*, 108—601; *Roberts v. Woodworking Co.*, 111—432; *Spence v. Cotton Mills*, 115—210; *Grady v. Wilson*, 115—344; *Webb v. Hicks*, 116—598; *Sams v. Price*, 119—572; *Burton v. Mfg. Co.*, 132—17; *Parker v. Express Co.*, 132—128; *Wright v. Insurance Co.*, 138—488.

Where an action is brought on an express contract for work done, recovery may be had on the implied contract, if the defendant has accepted and used the work. *Dixon v. Gravely*, 117—84; *Moffitt v. Glass*, 117—142; *Simpson v. R. R.*, 112—703; *McPhail v. Comrs.*, 119—330; *Byerly v. Kopley*, 46—35; *Dover v. Plemmons*, 32—23; *Morrison v. Mining Co.*, 143—250; *Corinthian Lodge v. Smith*, 147—244; *Haywood v. Leonard*, 7 Pick., 181, 19 A. D., 268; *Britton v. Turner*, 6 N. H., 481, 26 A. D., 713; 6 R. C. L., 973. But when the work is not done at the request of the defendant and he does not accept and take the benefit of it, he is not liable. *Foy v. Craven*, 111—129. In *Penny v. Fort*, 122—230, there was an express and an implied contract, with separate items in each.

2. Divisible contracts.

(249) WOOTEN v. WALTERS,

110 N. C., 251, 14 S. E., 734, 736—1892.

The plaintiff and defendant made an oral agreement to exchange property. The plaintiff agreed to let defendant have his storehouse and lot and his stock of goods, fixing the price of each separately, for the defendant's interest in an oil mill. The exchange was made, the plaintiff taking charge of the mill, and the defendant taking the storehouse and the goods. In about two weeks plaintiff notified defendant that he would not complete the trade, demanded the return of the storehouse and stock of goods, and offered to return the mill. Defendant refused to exchange again, and this action was brought. A referee found the facts, and as a conclusion of law that the contract of the plaintiff was entire. The judge below "adjudged that the contract was divisible," and rendered judgment that the plaintiff recover the storehouse and lot, that the defendant retain the goods, and recover of the plaintiff \$971.32, the amount found due by the referee.

The plaintiff excepted and appealed.

MERRIMON, C. J. A contract is entire, and not severable, when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and interdependent. Such a contract possesses essential oneness in all material respects. The consideration of it is entire on both sides. Hence, where there is a contract to pay a gross sum of money for a certain definite consideration, it is entire, and not severable or apportionable in law or equity. Thus, where a particular thing is sold for a definite price, the contract is an entirety and the purchaser will be liable for the entire sum agreed to be paid. And so also, when two or more things are sold together for a gross sum, the contract is not severable. The seller is bound to deliver the whole of the things sold, and the buyer to pay the whole price, in the absence of fraud. Hence, it has been held that where a cow and four hundred pound of hay were sold for \$17 the contract was entire. Mr. Justice *Story* says that "the principle upon which this rule is founded, seems to be that as the contract is founded upon a consideration dependent upon the entire performance thereof, if for any cause it be not wholly performed the *casus foederis* does not arise, and the law will not make provision for exigencies against which the parties have neglected to fortify themselves." Such contracts are enforceable only as a whole.

On the other hand, a several contract is one in its nature and

purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. Hence, an action may be maintained for a breach of it in one respect and not necessarily in another, or for several breaches, while in other material respects it remains intact. In such a contract the consideration is not single and entire as to all its several provisions as a whole; until it is performed it is capable of division and apportionment. Thus, though a number of things be brought together without fixing an entire price for the whole, but the price of each article is to be ascertained by a rate or measure as to several articles, or when the things being of different kinds, though a total price is named, but a certain price is fixed for each thing, the contract in such cases may be treated as a separate contract for each article, although they all be included in one instrument of conveyance, or by one contract. Thus where a party purchased two parcels of real estate, the one for a specified price and the other for a fixed price, and took one conveyance of both, and he was afterwards ejected from one of them by reason of defect of title, it was held that he was entitled to recover therefor from the vendor. *Johnson v. Johnson*, 3 Bos. & Pul., 162; *Minor v. Bradley*, 22 Pick., 459. So also it was held where a certain farm and dead stock and growing wheat were all sold together, but a separate price was affixed to each of these things, it was held that the contract was entire as to each item and was severable into three contracts, and hence a failure to comply with the contract as to one item did not invalidate the sale and give the vendor a right to reject the whole contract. In such case the contract may be entire or several, according to the circumstances of each particular case and the criterion is to be found in the question whether the whole quantity—all of the things as a whole—is of the essence of the contract. If it appear that the purpose was to take the whole or none, then the contract would be entire; otherwise, it would be severable. It is sometimes difficult to determine whether the contract is entire or severable in such cases, and there is great diversity of decisions on the subject, "but on the whole, the weight of opinion and the more reasonable rule would seem to be that where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties." This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts and the circumstances of each particular case. *Brewer v. Tysor*, 48—180; *Niblett v. Herring*, 49—

262; *Brewer v. Tysor*, 50—173; *Dula v. Cowles*, 52—290; *Jarrett v. Self*, 90—478; *Chamblee v. Baker*, 95—98; *Lawing v. Rintles*, 97—350; *Pioneer Mfg. Co. v. Assurance Co.*, 110—176; *Story on Cont.*, secs. 21, 25; 3 *Par. Cont.*, 187; *Wharton Cont.*, secs. 338, 511, 748.

Applying the rules of law thus stated to the case before us, we are of the opinion that the contract to be interpreted treated as executory, is severable and the sale of the goods therein mentioned was not necessarily an inseparable part of the land embraced by this contract. Although it is single, it embraces the sale of two distinct things, each having a certain price affixed to it, and the price paid for the whole being susceptible of apportionment. Neither by the terms of the contract settled by the findings of fact, nor by its nature and purpose, does it appear that the storehouse lot of land and stock of goods, distinct things, were both necessary parts of an entire contract. These things were not necessary parts of each other; they were entirely capable of being sold separately. Nor does it appear that they were sold as a single whole. On the contrary, they were spoken of and treated as different subjects of sale, a specified price was affixed to the land, and a distinct definite price affixed to the goods. Wherefore this distinction? Why was the price fixed as to the separate and distinct subjects of sale? As we have seen, the two things were not necessary to each other, and nothing was said or done by the parties, nor does anything appear to show that the party would not have made the contract unless it embraced both the sale of the land and the stock of goods. The sale of the stock of goods was not part or parcel of the sale of the land nor dependent upon it; although the sale of both was made at the same time and embraced by the same contract, severable in its nature and purpose, they were treated as distinct subjects of sale, the price of each being definitely fixed. The mere fact that the plaintiff was about to change the character of his business, did not imply that the storehouses and the land on which they were situate must be sold with the goods, else the goods would not be sold. Such things are valuable to let for rent. There is an absence of anything that shows a purpose to sell the two things as an inseparable whole. When, therefore, the plaintiff avoided the contract, not reduced to writing as to the land, as he might do under the statute pertinent, he did not avoid the contract as to the stock of goods; the contract was severable, and as to the goods was valid and remained of force and continued to have effect.

It seems that really the contract was executed as to the goods, and the sale might on that ground be upheld without reference to

the ineffectual sale of the land, but no question in that aspect of the case was raised. Affirmed.

In *Keel v. Construction Co.*, 143—429, there was a contract to build a house, the work to be paid for in installments as the work progressed, and the house was destroyed before it was completed; the contract was held to be divisible. Compare *Lawing v. Rintels*, 97—350, *post*, 261. A policy of insurance is a single contract, but divisible in regard to the articles insured. *Mfg. Co. v. Assurance Co.*, 110—176; but see *Coggins v. Ins. Co.*, 144—7. Hiring slaves at \$25 a month, to keep them during the year unless the owner is dissatisfied, is divisible. *Johnson v. Dunn*, 51—122. Renting a storehouse and lot at \$40 and part of the crop, is indivisible. *Reynolds v. Taylor*, 144—165. Employment at \$1,800 a year, which is paid for by the month, is divisible. *Edwards v. R. R.*, 121—490. For the same distinction as made above, 7 *Am. & Eng. Encyc.*, 95, 96, 97, 150; *Clark Cont.*, 453; 53 *L. R. A.*, 828; 9 *Cyc.*, 648.

Installments.—Where the contract is for property to be delivered in installments, there is a difference of opinion as to whether a failure in one instance discharges the contract or only gives a claim for damages. See discussion in *Clark Cont.*, 454, citing *Hoare v. Rennie*, 5 *Hurl. & N.*, 19, *Simpson v. Crippin*, *L. R. 8, Q. B.* 14, for the two views in England, and *Norrington v. Wright*, 115 *U. S.*, 188, for the majority view, that it is a discharge. The question is one of construction in ascertaining the intention of the parties. See *Hassard-Short v. Hardison*, 114—482; 117—60; *Johnson v. Dunn*, 51—122. In *Grocery Co. v. Bag Co.*, 142—p. 184, it is said: "Although performance to a certain extent is divisible, yet if the default in one item of a continuous contract is accompanied with an announcement of an intention by the party thus in default not to perform it upon the agreed terms, the other party may treat the contract as being at an end. And he may likewise do so, if it appear that the failure to perform is deliberate and intentional, and not the result of mere inadvertence or inability to perform." Citing 9 *Cyc.*, 649, and numerous cases; see also 3 *Page Cont.*, secs. 1489—1493; 30 *L. R. A.*, 33; 57 *L. R. A.*, 225; *Quarton v. Am. Law Book Co.*, 143 *Iowa*, 517, 121 *N. W.*, 1009, 32 *L. R. A.* (*N. S.*), 1; *Henningsen v. Tonopah R. Co.*, 33 *Nev.*, 208, 111 *Pac.*, 36, 119 *Pac.*, 774, *Ann. Cas.*, 1913 *D.*, 1008; *Willis v. Construction Co.*, 152—100; *Steamboat Co. v. Transportation Co.*, 166—582; 6 *R. C. L.*, 972.

3. Independent and dependent promises.

1. ABSOLUTE.

(250) *McGRAW v. GILMER*, *Admr.*,

83 *N. C.*, 162—1880.

Claim and delivery proceedings for a cow. The defendant's intestate, a lawyer, wrote to plaintiff: "If you will send me the cow I will save you \$18, in settlement of the case against your son." The plaintiff sent the cow, and defendant's intestate died before performing the service promised, and his estate was insolvent. Plaintiff brought this action to recover the cow. There was a judgment for the plaintiff, and defendant appealed.

ASHE, J. This court can not take into consideration the insolvency of the defendant. The sole question is, did the title to the cow pass absolutely to the defendant's intestate with the delivery

of her to him, or was the sale conditional, and did the title remain in the vendor.

There is error in the judgment of the court below. We are unable to discover the conditional character of the transaction. It is an absolute unconditional sale of the cow. The defendant says to the plaintiff, send me your cow and I will perform for you certain services. The cow is sent, is delivered upon this contract into the actual possession of the defendant's intestate. There is no more condition in this sale than in the ordinary sale of a chattel on a credit; as where one buys a horse and promises to pay the price at a future day, and the horse upon the faith of the promise is at once delivered into the possession of the vendee, it never has been contended that on failure of the vendee to pay on the day agreed upon, that the vendor could retake the horse or maintain an action for it, for it is well settled in such a case that by the delivery of the horse into the actual possession of the vendee, the title of the vendor is gone and the horse has become the property of the vendee, and the vendor has agreed to take for it the vendee's promise to pay the price. So that if the vendee fail to pay at the time agreed, the vendor's remedy is limited to an action for the breach of that promise, the damages for the breach being the amount of the price promised with interest. *Benj. on Sales*, 622, 625.

There is error. The judgment in the court below is reversed.

Where A made a valid promise to deliver property at a certain place within a certain time, and it does not appear that B, the other party, had anything to do on his part, A's promise is absolute, and he must comply or attempt to do so whether B is at the place or not. *Cowper v. Sanders*, 15—283. Where the performance of one promise does not depend upon the performance of the other, but only upon the promise, it is absolute. *Clark Cont.*, 450. See *Burns v. McGregor*, 90—222; 9 *Cyc.*, 642. In a contract of sale where the vendor has done all that he was required to do, the promise of the vendee is absolute, and in case of destruction of the property the loss will fall on him. *Whitlock v. Lumber Co.*, 145—120, and cases cited; *Tufts v. Griffin*, 107—47. For dependent and independent covenants, see *Crampton v. McLaughlin Realty Co.*, 51 *Wash.*, 525, 99 *Pac.*, 586, 21 *L. R. A. (N. S.)*, 823; *Paine v. Brown*, 37 *N. Y.*, 228.

2. CONDITIONAL.

(1) *Condition subsequent, ante* (230).

(2) *Conditions concurrent.*

(251) *GRANDY v. McCLEESE*,

47 *N. C.*, 142, 64 *A. D.*, 574—1855. . .

Action of *assumpsit* for nondelivery of a quantity of corn. The defendant had a large quantity of corn to sell and asked the plaintiff 60 cents a bushel for it; plaintiff offered 58 cents, and defend-

ant said, "You can send for it." Plaintiff sent a vessel for it, but did not send the money to pay for it or say anything about paying for it, though he had made arrangements with a bank to get the money. Defendant did not know about his not sending the money or his having made any arrangement, but denied the contract and refused to deliver the corn, because the price had gone up. There was a judgment for plaintiff, and defendant appealed.

BATTLE, J. The contract proved by the testimony was simply an executory one for the sale of a quantity of corn at a stipulated price; the legal effect of it was to bind the parties to the performance of concurrent acts. The plaintiff was to send for the corn and to pay for it on delivery; and the defendant was to deliver upon receiving payment. Neither could demand a performance by the other, without the allegation and proof of his own readiness and ability to perform his part of the agreement. 2 Blk. Com., 447; Cowper v. Saunders, 15 N. C., 283; Cole v. Hester, 31 N. C., 23. The plaintiff, then, could not sustain his action for a breach of the contract by the defendant, without showing that he himself had paid or tendered the price of the corn, or was ready and able to do so, or that the defendant had done something to discharge him from that duty. It is contended by his counsel that the denial of the contract by the defendant was a breach of it, and dispensed with proof on the part of the plaintiff that he had paid, or tendered the money, or had it ready to be paid or tendered at the time when he demanded the corn; and such was the charge of His Honor to the jury in the court below. We do not concur in that opinion, in the extent to which it was carried; we admit that the conduct of the defendant dispensed with the obligation on the part of the plaintiff to pay the money, or even to tender it; but it did not relieve him from the necessity of having it ready to be paid or tendered. Abrams v. Suttles, 44 N. C., 99. Until he had provided the means to pay for the corn upon delivery, he had not put himself in a situation in which he had a right to demand it. There was no testimony to show that it was to be paid for at any other time, or place, than that when and where it was to be delivered; the arrangement made by the plaintiff with the cashier of the Farmers' Bank at Elizabeth City for procuring the money with which to pay for the corn, could not have availed him, had it been made known to the defendant, and of course it can not aid him when it was never communicated to the defendant. There was error in the instruction given by the court to the jury for which there must be a *venire de novo*.

To the same effect are Grandy v. Small, 48—8; 50—50; Hurlbut v. Simpson, 25—233; Hughes v. Knott, 138—105; Hendricks v. Furn. Co., 156—569; Wildes v. Nelson, 154—590.

Mutual dependent conditions must be performed or readiness shown as a condition to bringing suit. *Lutz v. Thompson*, 87—334; *Jones v. Mial*, 82—252; 79—164; *Braswell v. Pope*, 82—57; *Hughes v. Knott*, 138—105; 140—550. Payment of money and delivery of goods concurrent. *Gardner v. King*, 24—297; *Christian v. Nixon*, 33—1; *Walker v. Allen*, 50—58; *Hardy v. McKesson*, 51—554; 52—567; *Sydnor v. Boyd*, 119—481. So where goods were sold on condition that notes should be given for the price, the passing of the title to the goods and the delivery of the notes are concurrent. *Mill-hiser v. Erdman*, 98—292; 103—27. When a note and security are to be given for the goods, payable in the future, and the purchaser fails to comply with this, action may be brought at once for such failure. *McRae v. Morrison*, 35—46; *Copeland v. Fowler*, 151—353; *Mord. & McL. Rem.*, 671.

(3) *Condition precedent.*

(252) CLAYTON v. BLAKE,

26 N. C., 497—1844.

Action of debt upon a contract for building a house. Plaintiff agreed to build a house for the defendant according to specifications given, in a neat and workmanlike manner, and completed by the 1st day of April, 1842. The defendant was to pay \$1,000 on the 1st day of December, and the balance, \$2,500, when the house was completed. The \$1,000 was paid, but the plaintiff did not complete the house until about the 1st day of June. There was a judgment for the plaintiff, and defendant appealed.

DANIEL, J. The plaintiff has brought an action of debt upon the deed set forth in the case, to recover \$3,500, the price of building a house for the defendant. The first installment of \$1,000 was agreed to be paid by the defendant, before the work was to be finished by the plaintiff; therefore that demand rested on an independent covenant. It has been paid and there is no dispute as to that sum. The "balance" (\$2,500) was to be paid when the house should be completed. The defendant resisted the plaintiff's recovery of this last installment, on the ground that he did not prove on the trial that he had completed the house within the time mentioned in the deed, to wit, on or before the 1st day of April, 1842. The court instructed the jury that the covenants in the indenture, on this point, were independent, and that the plaintiff was entitled to recover. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and, however transposed they may be in the deed, their precedency must depend on the order of time, in which the intent of the transaction requires their performance. *Kingston v. Preston*, cited in *Jones v. Blakeley*, Doug., 689; *Wills.*, 496; *Platt on Covenants*, 79. Taking the above directions as to the law on the subject, we must say that the judge erred in his charge. For we collect the intention and meaning of the parties to be that the

\$2,500 was to be paid, if the plaintiff completed the house by the 1st day of April, 1842; at which time he had covenanted that the houses should be completed. The word *when* must have reference to the time antecedently agreed upon by the parties for the completion of the building; and that time was the 1st day of April, 1842. The completion of the house by the plaintiff in a workmanlike manner in the time stipulated in the deed was, we think, a condition precedent to his right by force of his deed, to claim the \$2,500. This case is like that of *Glazebrook v. Woodrow*, 8 Term R., 366, where the plaintiff covenanted to sell to the defendant a schoolhouse, and to convey the same to him on or before the 1st day of August, 1797, and to deliver up the possession to him on the 24th of June, 1796; and in consideration thereof the defendant covenanted to pay to the plaintiff 120 pounds, on or before the 1st day of August, 1797. It was holden that the covenant to convey, and that for the payment of the money, were dependent covenants; and that the plaintiff could not maintain an action for the 120 pounds, without averring that he had conveyed, or tendered a conveyance to the defendant. Although the plaintiff may be unable to recover in his action as now framed, yet he may not be without remedy for such sum as he ought to recover. For if he has built a house for the defendant, which the latter has accepted and used, the plaintiff will be entitled to recover the just value of his work and labor, as estimated by a jury, in a proper action.

Per Curiam.

New trial awarded.

See *Mizell v. Burnett*, 49—249; *Simmons v. Cahoon*, 68—393; *Lutz v. Thompson*, 87—334. For similar contracts, see *Lawing v. Rintels*, 97—350; *Keel v. Construction Co.*, 143—429. See also cases under *Entire Contracts*, *supra*.

When a slave was hired with the understanding that he was not to be taken out of the county except at hirer's risk, and he was taken out of the county and died, the hirer is liable. *Bell v. Bowen*, 46—316. When goods are sold upon condition that the freight is not to exceed 10 percent, and the freight does exceed that amount, the buyer may refuse to receive them; but he should do so at once and notify the seller; if before he gives such notice, the seller reduces the freight charge, the buyer must take the goods. *Forbes v. Branson*, 81—256. Where A agreed to manufacture a certain quantity of tobacco for B, between the 1st day of May and the 15th day of October, for which B was to pay 10 cents a pound and pay the taxes and for the ingredients used, and payment was to be made whenever notice was given that 100 boxes were ready; A's promise was not dependent upon B's as a condition. *Foard v. Bessent*, 68—223. Where A agreed to make fifty wheat fans for B by a certain day, and B was to furnish the materials by a certain day, B's promise was a condition precedent. *Dwiggins v. Shaw*, 28—46. But in an option a tender of a deed is not a condition precedent. *Trodden v. Williams*, 144—192; *Hardy v. Ward*, 151—385.

A promise to pay \$100 for evidence to prove a certain fact is not due until the evidence is produced in such a way that it can be used. *Williams v. Thompson*, 48—363. A agreed to let B have all he could sell his land for over \$1,500; B sold it on credit for \$1,800; A would not be required to pay until the money was collected. *Joice v. Bohannon*, 49—364. A salesman, whose contract requires him to report each day and send in his expense ac-

count each week, violates his contract by failure to do so. *Johnson v. Machine Works*, 130—441. A note payable whenever the Legislature shall pass an act recognizing certain bonds, depends upon this contingency. *Leak v. Bear*, 80—271. A bond payable whenever a suit pending is decided in favor of the plaintiff, is due when the suit is compromised so that the plaintiff gets a judgment. *Kittrell v. Hawkins*, 74—412. A note payable six months after a ratification of a treaty of peace between the United States and the Confederate States, depends upon a condition precedent which was not and can not be performed. *McNinch v. Ramsay*, 66—229.

In a contract to saw lumber at a mill out of logs to be furnished, the furnishing of the logs is a condition precedent. *Ducker v. Cochrane*, 92—597. Where an application for insurance states that no insurance shall be in force until payment of premium and delivery of the policy, this is a valid condition. *Whitley v. Ins. Co.*, 71—480; *Barnes v. Ins. Co.*, 74—22; *Ormond v. Ins. Co.*, 96—158; *Ross v. Ins. Co.*, 124—395; *Ray v. Ins. Co.*, 126—166; *Rayburn v. Casualty Co.*, 138—379. When one undertakes to serve another, there is an implied vital condition that he is competent for the service. *Ivey v. Cotton Mills*, 143—189; but to show incompetency is the duty of the other party. *Dietrich v. Lumber Co.*, 127—25; *McKeithan v. Telegraph Co.*, 136—213; *Eubanks v. Alspaugh*, 139—520. Where A bought from B 300 barrels of rosin and paid for them, and was to call for them "within the next week," but failed to do so; B had more than that amount on hand, and the rosin was destroyed; the loss would fall upon A, and he could not recover from B for failure to deliver the rosin. *Willard v. Perkins*, 44—253. For other cases of failure to comply with condition, see *Corinthian Lodge v. Smith*, 147—244; *Supply Co. v. Roofing Co.*, 160—443; *Leonard v. Dyer*, 26 Conn., 172, 68 A. D., 382; *Lake Shore & Mich. R. Co. v. Richards*, 152 Ill., 59, 30 L. R. A., 33; 6 R. C. L., 904.

(4) *Condition and warranty.*

(253) LEWIS v. ROUNTREE,

78 N. C., 323—1878.

Civil action for breach of contract. Plaintiff bought from the defendant 517 barrels of "strained rosin" and paid for the same; these were selected by the plaintiff out of a large number of barrels belonging to the defendant at Wilson, N. C.; the inspection was made by taking samples out of about 20 barrels, and the 517 barrels were shipped to New York, the whole number being represented to correspond with the sample; upon inspection in New York only 116 barrels came up to the description, and 401 were not strained rosin. There was no fraud on the part of the defendant, for there were more than 517 barrels of strained rosin in the lot from which the 517 were taken. His Honor held "that the plaintiffs did not get the number of barrels of strained rosin because of their own mistake, and by reason of the fact that suit was brought 11 months after the sale without notice to the defendants of the mistake, or demand to supply other rosin in place of the inferior rosin which the plaintiffs, relying upon their own judgment, selected and carried off and sold," the plaintiffs were not entitled to recover. The plaintiffs appealed.

RODMAN, J. We think the judge came to a wrong conclusion. The defendants agreed to deliver 517 barrels of strained rosin, which clearly amounts to a warranty that the article which they deliver is of that specific description. It may be called a condition precedent, and so it is, for the purpose that the vendee is not obliged to receive the article unless it comes within the description. But it is more than that, for it is held, as will presently be seen, that after the vendee has received and retained the articles, he may recover damages if they do not come within the specified description; the description must therefore be a warranty, or what practically is equivalent to it. Benjamin on Sales, secs. 600, 647. Of course, it is not meant that words of description are always a warranty. But the cases in which it is held have all something special to take them out of the rule, and to show that in those cases it was not so intended.

That plaintiffs had an opportunity to inspect the rosin before or when it was delivered and did in fact select the particular barrels out of a large number, did not amount to a waiver of the warranty that it should be of the specific description. This is reasonable. It is almost impossible, or at least very difficult, to tell from any inspection of a barrel of rosin short of breaking it up into fragments, whether it contains dross, that is, chips, dirt, etc., or not. And to break it up makes it unfit for transportation and unmarketable. All the above propositions are supported by authority.

In *Jones v. Just*, L. R., 3; Q. B., 197, *Mellor, J.*, says: "In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not, it is unnecessary to put any other question to the jury."

The judge refers to the case of *Josling v. Kingsford*, C. B. N. S., 447 (106 E. C. L. R.), in which it is distinctly held that even if the vendee has an opportunity to examine the goods before receiving them, yet if the defect be not patent, he may receive them, and maintain an action upon the warranty that they did not come within the specific description. Examination, or what is equivalent, an opportunity of examination, is a waiver of any implied warranty as to the quality of the goods, but not that they shall be of the specific description.

On the argument, *Lush, Q. C.*, for the vendor, who was the defendant, in reply to a remark of *Erle, J.*, said: "That raises the broad question which has never yet been specifically decided, viz., whether upon a sale of goods where the buyer has an opportunity of inspecting them, and buys, relying on his own judgment, any warranty can be implied either as to quality, or as to the thing

being that which it is represented to be." The decision was as above stated. This case is on all fours with the one before us, and both as to reasoning, and on a question of this sort, as authority, must be deemed conclusive. See also *Allen v. Lake*, 18 Q. B., 560; *Benj. on Sales*, sec. 600, note p., sec. 647.

It is said, however, that as soon as plaintiff discovered that a part of the rosin did not come within the description of strained rosin, which he did after it arrived in New York, he was bound to notify the defendants of the defect and to offer to return the rosin to them. We think this is answered by the case of *Poulton v. Latimore*, 9 B. & C., 259 (17 E. C. L. R., 373). In that case *Littledale, J.*, said: "I am of opinion that where goods are warranted, the vendee is entitled, although he do not return them to the vendor, or give notice of their defective quality, to bring an action for breach of the warranty," etc. It is true in that case the plaintiff declared upon a breach of warranty as to quality; but there can be no difference in principle between such a warranty, and one as to the identity of the article. *Benj. on Sales*, secs. 897 and 899, note *r*. The only result of a failure to offer to return the goods, or to notify the vendor of their defective quality, is to raise a presumption that the complaint of the quality is not well founded. In this case the plaintiff had paid for the goods, and the property in them had passed to him. The defendant was under no obligation to receive them back and return the price. The case of *Cox v. Long*, 69 N. C., 7, supports this view. The plaintiff had contracted and paid for shingles of certain dimensions, and had received and used those delivered with knowledge that they did not correspond to the warranty, without having offered to return them; and it was held that he was entitled to recover damages for breach of the warranty. We think the judge erred in holding that the plaintiff was not entitled to recover.

Error.

Judgment reversed.

(254) ERWIN v. MAXWELL,

7 N. C., 241, 9 A. D., 602—1819.

Assumpsit on warranty in the sale of a horse. Plaintiff bought a horse from defendant, and after they had agreed upon the sale and the money was about to be paid, or after it was paid, plaintiff asked defendant if the horse was sound, and he said it was; plaintiff said that some persons did not like his eyes, and defendant said they were good, for anything he knew to the contrary, that he had been badly cut for the hooks; plaintiff alleged that the horse was lame and stiff and could not travel well. There was a judgment of nonsuit from which plaintiff appealed.

TAYLOR, C. J. A few plain principles have been established by many decisions, on the subject of warranty, the application of which to this will free it from difficulty. As a warranty renders the party subject to all losses arising from a failure of it, however innocent he may be, much caution has been exercised in courts of law in creating an obligation of such extent. Hence, the rule that on the sale of chattels, there is not any implied warranty, except as to the title; that to constitute a warranty it must be express, and will not be implied by a mere affirmation of the quality or kind of the article sold, nor by a mere affirmation of the value, nor where the subject is of dubious quality, on which common judgment might be deceived. Therefore when an auctioneer, on the sale of pictures, set in the printed catalogue opposite to each, the name of a painter, it was determined not to amount to a warranty of the picture's being the work of such artist. 2 Esp. Rep., 572. In every case upon the sale of a chattel, where there is neither a warranty nor deceit, the buyer purchases at his peril. In the case of *Chandler v. Lopez* (Cro. Jac.), it was determined that for selling a jewel, which was affirmed to be a bezoar stone, when it was not, no action lay, unless the defendant knew it was not a bezoar stone, or had warranted it to be one. And in *Packinson v. Lee* (2 East., 314), it was decided that a fair, merchantable price did not raise an implied warranty; that if there be no warranty, and the seller sell the thing such as he believes it to be, without fraud, he will not be liable for a latent defect. Lord Coke says, "That by the civil law, every man is bound to warrant the thing that he selleth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty in deed or in law." And Fitzherbert, in the *Nat. Brev.*, 94 c., says, "That if a man sell wine that is corrupted, or a horse that is diseased, and there be no warranty, it is at the buyer's peril, and his eyes and his taste ought to be the judges in that case." It appears from all the authorities that without a warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects; and a contrary rule is nowhere laid down. The principle, on which the common law proceeds, being, that the purchaser ought to apply his attention to those particulars which may be supposed to be within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which can not be supposed to be immediately within the reach of such attention. The purchaser may always provide against his own want of vigilance or skill, by requiring the vendor to warrant. Saying, when the money was paid, that the horse was sound, did not amount to a warranty, to make an affirmation at the time of the sale, a warranty, it must appear by the evidence to be so intended, and not to have been a

mere matter of judgment and opinion. 3 Term Rep., 57. Carth., 90; Salk., 210. Here the plaintiff seemed content with the assertion of the defendant as to the soundness of the horse, though he had been previously advised to take a warranty. If, then, the defendant asserted only what he believed, and the contrary does not appear; and the plaintiff chose to run the risk of being able to prove that the defendant knew of the unsoundness, when he might have procured an indemnity, with or without that knowledge, there is neither hardship nor injustice in throwing the loss on him. The nonsuit must, therefore, stand, and the rule for a new trial be discharged.

(255) GIFFORD v. BETTS,

64 N. C., 62—1870.

Action of *assumpsit*. Plaintiff bought flour of defendant at \$40 a barrel; part of it was inferior, and plaintiff notified defendant to take it and return the money, or he would sell it at auction and charge him with the difference; defendant did not reply, and plaintiff sold the flour for \$20 a barrel and sued for the difference and expenses. There was a judgment for plaintiff, and defendant appealed.

DICK, J. The plaintiff bought, and paid for, three hundred and forty-five barrels of flour, which were to be delivered to him by the defendant, at Charlotte. At the time of the sale the defendant expressly "stipulated that the whole of the flour should be of the quality known to the merchants as extra, and superfine." This stipulation amounted to an express warranty of the quality of the flour. The whole quantity reached Charlotte in due time, but upon inspection, sixty-six barrels proved to be of inferior quality. The plaintiff might have brought an action at once, founded upon this breach of warranty, without an offer to return the goods to the defendant, or giving him notice of his breach of warranty. Chit. on Con., 458; 2 Saund. Pl. & Ev., 916.

The plaintiff, however, preferred to notify the defendant immediately that the inferior flour was not accepted in discharge of the contract. As the defendant declined to remove the goods which were not of the quality warranted, and pay back the purchase money, the plaintiff had a right to sell them in a reasonable time, and recover from the defendant on the special contract the loss upon the resale, and all proper expenses, so as fully to reimburse himself for the money expended, but not for the loss of a good bargain. 1 Pars. Cont., 475.

Per Curiam.

Judgment affirmed.

(256) ASHFORD v. SHRADER CO.,

167 N. C., 45, 83 S. E., 29—1914.

This was an action for the recovery of damages for an alleged breach of an implied warranty in the sale of oranges. The contract was to sell 600 boxes of oranges at a price fixed, without further description, and the right was given to the plaintiffs, the purchasers, to inspect. The plaintiffs exercised ordinary care in the inspection of the oranges, when they arrived, did not discover any defect, paid the purchase money, and afterwards found that one-third of them were rotten and unfit for sale. The defendant excepted to the charge of the court that there was an implied warranty that the oranges should be salable, and also to the charge as to the duty of the plaintiffs to inspect. There was a judgment for plaintiffs, and defendant appealed.

ALLEN, J. The maxim of the civil law is *caveat venditor*, while the maxim of the common law is *caveat emptor*, and it is generally held, in courts where the common law is administered, that in contracts for the sale of personal property, as between dealers, there is no implied warranty as to quality. *Farrell v. Market Co.*, 198 Mass., 271, 84 N. E., 481, 15 L. R. A. (N. S.), 884, and cases in note, 126 Am. St. Rep., 436, 15 Ann. Cas., 1076; *Shingle Co. v. Mill Co.*, 52 Wash., 620, 101 Pac., 233, 35 L. R. A. (N. S.), 261, and note; *Tiffany on Sales*, 252; 35 Cyc., 397; *Dickson v. Jordan*, 33 N. C., 166, 53 Am. Dec., 1403; *Woodridge v. Brown*, 149 N. C., 302, 62 S. E., 1076. This rule has not been stated more clearly or with greater strictness anywhere than in the two cases cited from our own reports.

In the first of these, *Pearson, J.*, speaking for the court, says: "It is a principle of the common law that no warranty of quality is implied in the sale of goods. *Caveat emptor*. In the absence of fraud, if the article proves to be of bad quality, the purchaser has no redress, unless he has taken the precaution to require a warranty. This rule is founded in wisdom; and its practical good sense is so well fitted to the habits of our trading people, that we are disposed to adhere to it. We believe it is adopted in almost all of the States of the Union, where the common law prevails,"—and this is quoted and approved in the latter case.

It seems that the exceptions to this rule are: (1) Where the sale is for a particular purpose; (2) by sample; (3) by particular description, or where it is sold by the manufacturer or producer. 35 Cyc., 399.

Along with this principle as to implied warranties is another of equal importance and prominence, and that is that the seller is

held to the duty of furnishing property in compliance with the contract of sale that is, at least, merchantable or salable.

In the case of *Randall v. Newson*, 2 Q. B., 109, after quoting from *Best*, C. J., in *Jones v. Bright*, 5 Bing., 30, that:

"If a man sells an article he thereby warrants that it is merchantable, and that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose. Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. The law then resolves itself into this: That if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

—and after commenting on other English cases, *Brett*, J., for the court says:

"I have cited these cases and the principles laid down in them in order clearly to ascertain what is the primary or ultimate rule from which the rules which have been applied to contracts of purchase and sale of somewhat different kinds have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognized in *Jones v. Just*. In some contracts the undertaking of the seller is said to be only that the articles shall be merchantable; in others that it shall be reasonably fit for the purpose to which it is applied. In all, it seems to us, it is either assumed or expressly stated that the fundamental undertaking is that the *article offered or delivered shall answer the description of it contained in the contract*. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, salable or merchantable."

This authority has been followed in *Jones v. Just*, 3 Q. B., 199; *Grieb v. Cole*, 60 Mich., 397, 27 N. W., 579, 1 Am. St. Rep., 536; *Howard v. Hoey*, 23 Wend. (N. Y.), 350, 35 Am. Dec., 572; *Peck v. Armstrong*, 38 Barb. (N. Y.), 218; *Warner v. Ice Co.*, 74 Me., 478; *Fitch v. Archibald*, 29 N. J. Law, 164; *Merriam v. Field*, 39 Wis., 580; *Hansen v. Brewing Co.*, 70 Ill. App., 265; and in our own reports in *Main v. Field*, 144 N. C., 311, 56 N. E., 943, 11

L. R. A. (N. S.), 245, 119 Am. St. Rep., 956; *Medicine Co. v. Davenport*, 163 N. C., 296, 79 S. E., 603.

In the last case Justice *Walker* quotes with approval from Benjamin on Sales and from the English cases, as follows:

"If a man sell an article, he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose.' *Jones v. Bright*, 5 Bing., 544. The principle was clearly expressed by Lord Ellenborough in *Gardiner v. Gray*, 4 Campbell, 143, where he denied the application of the rule as to sales by sample: 'I am of opinion, however, that under such circumstances the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He can not without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser can not be supposed to buy goods to lay them on a dunghill. The question then is whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as *waste silk*. The witnesses describe it as unfit for the purposes of waste silk, and of such a quality that it can not be sold under that denomination.'"

We are therefore of opinion that His Honor's charge was correct; that there was an implied warranty in the sale of the oranges that they should be at least salable, and the question as to the waiver of the warranty was submitted to the jury, under instructions which were fair to both parties.

The evidence offered upon the part of the plaintiff tended to prove that the oranges were packed by machinery, and that if they were taken from the boxes they could not be replaced, and that the inspection that was made was the one usually made in the trade, and was such as men of ordinary prudence engaged in like business would have made, and the jury has found this evidence to be true.

We find no error in the record, and the judgment is affirmed.

(257) *OLTMAN v. WILLIAMS*,

167 N. C., 312, 83 S. E., 348—1914.

This was an action to recover money due on notes given for the purchase of a German coach stallion. Among other defenses, the defendants set up a counterclaim for damages for breach of war-

ranty contained in the written agreement. There was a judgment for plaintiff, and defendants appealed.

BROWN, J. . . . The paper writing is entitled "Guaranty," and contains the following clause: . . . "If said horse does not prove to be as represented, the said party of the first part hereby covenants and agrees to replace said horse Ellmer with another German coach stallion equally as good or refund the money to said second party, provided said second party shall return said stallion to said first party in as good health and condition on or before March 1, 1909, as when said stallion was delivered to said second party."

It is well settled that a party relying upon and setting up a written warranty of quality in the sale of personal property is bound by the terms of that warranty and must comply with them, in order to be entitled to redress in an action to cover the purchase price. *Bank v. Walser*, 162 N. C., 54, 77 S. E., 1006; *Main v. Griffin*, 141 N. C., 43, 53 S. E., 727; *Robinson v. Huffstetler*, 165 N. C., 459, 81 S. E. 753. In the last case it is said:

"It seems, therefore, to be settled that when there is an express warranty in the sale or exchange of personal property, and it is a part of the contract . . . that the property is to be returned within a specified time, if not as warranted to be, the complaining party can have no redress by reason of the warranty, in the absence of fraud, without offering to return the property within the time named."

The contract of warranty in *Piano Co. v. Kennedy*, 152 N. C., 196, 67 S. E., 488, is very similar to the warranty in this case. In that case it is said that:

"A party relying upon and setting up a written warranty of the quality in the sale of personal property and a counterclaim for damages for its breach, in an action by the seller for the purchase money, is bound by the terms of the warranty, and must comply with them in order to recover"—citing 30 Am. & Eng. Ency. Law, p. 199.

See, also, *Main v. Field*, 144 N. C., 307, 56 S. E., 943, 11 L. R. A. (N. S.), 245, 119 Am. St. Rep., 956; *Mfg. Co. v. Lbr. Co.*, 159 N. C., 510, 75 S. E., 718; *Walters v. Akers* (Ky.), 101 S. W., 1179; *Wilson v. Ward*, 159 Ind., 21, 64 N. E., 458; *Wilson v. Nichols & Shepherd*, 139 Ky., 506, 97 S. W., 18.

As we construe this contract, it was obligatory and not discretionary with the defendants to return the horse to the plaintiffs on or before March 1, 1909, in order that the plaintiffs may fulfill their guaranty by replacing the horse Ellmer with another German coach stallion equally as good or refund the money to the defendants. This construction brings the case clearly within the princi-

ple laid down in all the authorities we have cited. . . . His Honor erred in submitting that issue [as to the breach of warranty and counterclaim] to the jury, as all the evidence proved, and in fact it was not contested, that the defendants did not comply with the terms of the warranty on their part, as was found by the jury.

Judgment affirmed.

See *Cox v. Long*, 69—7, and cases cited; *Finch v. Gregg*, 126—176. Where a vendor sells an article by a particular description, it is a condition precedent that it shall answer the description; if this condition is not performed, the purchaser may reject it, or if he has paid for it, recover the price; generally it is necessary to return the article, but not if it is destroyed in making the discovery, or is entirely without value. *Smith v. Love*, 64—439 (sale of guano); *Caldwell v. Smith*, 20—193. Where goods are sold to be paid for in good notes, if the notes are not good, the seller may return them and sue for goods sold and delivered. *Bell v. Ballance*, 12—391. Where property is sold to be first class, and is returned as being unfit for the intended use, the purchaser is entitled to recover the amount which he agreed to pay, his negotiable note for the same having been transferred before maturity. *Baker v. Brem*, 103—72. When plaintiff sold defendant a car of peanuts, and loaded them in time on Saturday, but on Monday opened the car and put in 33 more bags, this was not a violation of the contract, but defendant did not have to take and pay for the extra bags. *Bowers v. Worth*, 129—36.

There is no implied warranty of quality in the sale of goods, in the absence of fraud, the doctrine of *caveat emptor* applies; as in the sale of rope, there is no warranty although the seller knew for what it was to be used, unless that entered into the contract. *Dickson v. Jordan*, 33—166. But where one manufactures articles for another, as shingles, for a particular purpose, there is a warranty that they shall be suitable for that purpose, and the seller can not recover the contract price, although they have been received and used, in ignorance of the defect. *Thomas v. Simpson*, 80—4. Where A bought and paid for a lot of corn from B by giving him C's note, without endorsement, and C became insolvent, A was not liable for the note and was entitled to the corn, *Long v. Spruill*, 52—96. See *Hatchell v. Odom*, 19—302; *supra*, (69); *Parker v. Leathers*, 55—249. For other cases on implied warranty, see *Machine Co. v. McClamrock*, 152—405; *Woodridge v. Brown*, 149—299; *Medicine Co. v. Davenport*, 163—294; *Grocery Co. v. Vernoy*, 167—427; *Hall Furn. Co. v. Crane-Breed Mfg. Co.*, — N. C., —, 85 S. E., 35; 6 R. C. L., 492, 990.

Whether there was a warranty is a question of intention. *Starnes v. Erwin*, 32—226; *Beasley v. Surles*, 140—605; *Wrenn v. Morgan*, 148—101; *Harris v. Cannady*, 149—81; *Hodges v. Smith*, 158—256. In the sale of a patent there is no implied warranty of title, in the sense that the patent is valid by not interfering with other patents. *Hiatt v. Twoomey*, 21—315. But warranty of title is generally implied in the sale of personalty, and it is not necessary for the purchaser to show that he has been deprived of the property by legal process. *Hodges v. Wilkinson*, 111—56.

Where a slave is sold with a warranty of soundness, nearsightedness is a defect that causes a breach. *Bell v. Jeffreys*, 35—356; but a warranty that one is "sound in mind and health" is not broken by a defect in the structure of the little finger. *Harrell v. Norvill*, 50—29; "diseased liver" would be a breach of general warranty of soundness. *McLean v. Waddill*, 50—137. If a soda fountain is sold with a warranty of good condition, this means not only that it will make good soda water at the time of sale, but that it has no defect that interferes with its future usefulness, *Pritchard v. Fox*, 49—140; *Andrews v. Peck*, 83 Conn., 666, 78 Atl., 445, 32 L. R. A. (N. S.), 181.

Where the terms of sale fix the conditions precedent to the existence of any rights under the warranty, such conditions must be complied with or the one injured can not recover. *Main v. Griffin*, 141—43; but in a similar case in *Main v. Field*, 144—307, the contract was rescinded, because the con-

dition was complied with in a reasonable time. This case also states that in all sales by samples there is an implied warranty that the articles shall come up to the sample, or generally that an article shall be merchantable. Where a contract for tobacco requires certain acts to be done by the seller before it is accepted, if the buyer accepts knowing that these acts have not been done, he waives his right to insist upon the condition, and must pay the price. *Dobson v. Moore*, 64—512; see also *Sapona Iron Co.*, 64—335. When the plaintiff paid for the goods to be delivered in two weeks, but they were not shipped for a month, and in the meantime had depreciated in value, his taking the goods and using them does not waive his right to damages for the breach. *Speers v. Halstead*, 74—620. Where A contracted to sell B cotton in bales, "to be the average grade of middling," none below "low middling," this was a warranty, and the fact that the vendee had an opportunity to inspect, did not waive the warranty. *Love v. Miller*, 104—582; *Ferrell v. Hales*, 119—199 (sale of to'acco). See also *Freeman v. Skinner*, 31—32, and *Waldo v. Halsey*, 48—107. For other cases of warranty similar to the principal cases above, see *Inge v. Bond*, 10—101; *Baum v. Stevens*, 24—411; *Foggert v. Blacwelder*, 26—238; *McKinnon v. McIntosh*, 98—89; *Osborne v. McCoy*, 107—726; *Mfg. Co. v. Davis*, 147—267; 17 L. R. A. (N. S.), 193; *Hampton Guano Co. v. Hill Live Stock Co.*, — N. C., —, 84 S. E., 774.

For instances of former practice, see *Howie v. Rea*, 70—559; *McEntire v. McEntire*, 34—299; *Moore v. Piercy*, 46—131; *Odom v. Harrison*, 46—402; *Hobbs v. Riddick*, 50—80; *Baines v. Drake*, 50—153; *Sapona Iron Co. v. Holt*, 64—335; *Ludlow Lumber Co. v. Kuhling*, 119 Ky., 251, 83 S. W., 634, 115 A. S. R., 254. Under the present practice, the buyer may refuse to take the goods for breach of warranty, or he may return them or notify the seller that he holds them subject to his order, or he may set up the damage as a counterclaim when sued for the price, or sue to recover damages, *Kester v. Miller*, 119—475; 30 Am. & Eng. Encyc., 190. There is a conflict of authority as to the right to rescind an executed contract for breach of warranty. "In the absence of agreement giving him the right to return the goods, it is the rule in most jurisdictions that the buyer in an executed contract of sale of goods can not on a breach of warranty return the goods, his remedy in such case being on the warranty. On the other hand, in other jurisdictions it has been held that the buyer may resort to either remedy, and his right is recognized generally when the sale is executory. . . . While the question has not been discussed fully and the distinctions noted in our reports, we have at least three cases in which it is either held that the purchaser may pursue either remedy or the right is assumed to exist." *Robinson v. Huffstetler*, 165—459, quoting from 35 Cyc., 434; *Kester v. Miller*, 119—476; *Mfg. Co. v. Gray*, 124—325; *Critcher v. Porter*, 135—547. The distinction, that a condition may avoid the contract while a warranty gives a cause of action for damages, is not always observed. 30 Am. & Eng. Encyc., 130; 9 Cyc., 646; *Clark Cont.*, 209, 464; 6 R. C. L., 991.

4. Failure of consideration.

(258) JOHNSTON v. SMITH,

86 N. C., 498—1882.

Civil action on contract. Plaintiff alleged that defendant gave to him a note for \$1,250, payable in four months, as the price of fifty shares of certain stock sold to him, and that plaintiff was to retain the stock as collateral security for the note; that the stock has no market value and plaintiff can not realize anything on the fifty shares which he caused to be issued to the defendant; the

note was not paid at maturity, and in this action the plaintiff tenders the certificates of stock upon payment of the debt.

The defendant demurred to the complaint, the first, second and eighth causes alleging insufficient consideration, total failure of consideration, and that the stock was worthless. The demurrer was sustained, and plaintiff appealed.

ASHE, J. The first and second causes of demurrer assigned, touching the want of consideration, involve the same point and will be treated together.

As the demurrer admits the facts stated in the complaint to be true, if the complaint had stated any facts from which it might be inferred that the stock had no value at the date of the contract, this ground of demurrer might properly have been sustained, but the complaint only states that the stock at the time of filing complaint had no market value, and the plaintiff could not realize anything from it—*non constat*, but that the stock may have had a market value at the date of the sale; nor does it follow that although the stock may have had no *market* value at the time of filing the complaint, it may not have had some intrinsic value at that date, and even market value at the date of the sale. And if at the time of the sale it had any value, no matter how small, it was a sufficient consideration to support the sale. *McEntire v. McEntire*, 34—299.

We understand the law to be settled by repeated adjudications in this State, that to defeat a sale or contract for the want of consideration, there must be an entire failure; and it is otherwise where there is only a partial failure, which can only be remedied by a distinct action, and now perhaps by a counterclaim. *Washburn v. Picot*, 14 N. C., 390; *Hobbs v. Riddick*, 50 N. C., 80. And what is meant by a failure of consideration is not simply that the article sold is worthless to the purchaser, but if it be of some value to the seller there is a consideration, by which the promise of the purchaser to pay the agreed price, however, disproportionate, may be sustained. If it be of no value to either party, it of course can not be made the basis of a sale. But if it is beneficial to the purchaser, in any degree, he ought to pay for it, and the law fixes his obligation at the agreed price; and if it is a loss to the seller he ought to be remunerated. *Johnson v. Titus*, 2 Hill Rep., 606; *Parley v. Batch*, 23 Pick., 283; *Hart v. Wright*, 17 Wend., 209; *Barnum v. Barnum*, 8 Conn., 469; *Brown v. Ray*, 32 N. C., 72; *Weatherly v. Miller*, 47—166; *Findlay v. Ray*, 50—125.

But some of the authorities go even further than these we have cited, and hold that where the purchaser gets that which he really intends to buy, although the thing bought proves to be of no value, there is not a failure of consideration; as where one bought rail-

way scrip and it was subsequently repudiated by the company upon the ground that it was issued without their authority, upon proof offered that the scrip was the only known scrip of the company, and had been for several months the subject of sale in the market: *Held*, the buyer had got what he really intended to buy, and could not rescind the contract on the ground of want of consideration. *Benj. on Sales*, 322; *Lambeth v. Heath*, 15 M. & W. (Ex. Rep.), 486; *Barnum v. Barnum*, *supra*. . . .

The eighth ground must be overruled, for the reason that "the complaint does not state that the certificate of fifty shares of stock in said company was utterly worthless and of no value when issued, and now." The complaint only states that said stock has no *market value*, and plaintiff can not realize anything from it. Because an article has no market value, it does not follow necessarily that it had no intrinsic value. The stock may have had no market value at the time of filing the complaint, and yet have had such value at the time of the sale.

We are of opinion there was error in the ruling of His Honor in sustaining the demurrer. The demurrer must therefore be overruled.

The portions of the case not treating of this point have been omitted. For other cases to the same effect, see *King v. Lindsay*, 38—77; *Welch v. Watkins*, 2—369; *Hurdle v. Richardson*, 52—16; *McEntire v. McEntire*, 34—299; *Page v. Einstein*, 52—147; *Parker v. Flora*, 63—474; *West v. Hall*, 64—43; *Smith v. Love*, 64—439; *Fair v. Shelton*, 128—105; *Evans v. Williamson*, 79—87; *Daniels v. Englehart*, 18 Idaho, 548, 111 Pac., 3, 39 L. R. A. (N. S.), 943.

Recovery of money paid. See *Bunch v. Lumber Co.*, 134—116; *Lowe v. Weatherly*, 20—353; *Tomlinson v. Bennett*, 145—279.

5. Alternative contracts.

(259) PLANK ROAD CO. v. BRYAN,

51 N. C., 82—1858.

Action of debt. The action was brought to recover \$400, the balance due upon subscription to the Plank Road Company, the subscription being made with the privilege of paying it in sawed lumber. Demand was made upon the defendant for the lumber, and he failed to furnish it, and also failed to pay a preliminary sum of one dollar on each share subscribed, and there was some evidence of his having taken part in the meeting of stockholders. The contention of defendant was, 1. That the evidence as to stockholders meeting was incompetent; 2. That failure to make the preliminary payment rendered the whole contract void; 3. That an action of debt would not lie. There was a judgment for the plaintiff, and defendant appealed.

BATTLE, J. (After discussing and overruling the first two con-

tentions above.) The last objection, which appears upon the defendant's bill of exceptions, is as far from being tenable as either of the others. The defendant's subscription was, in effect, for eight shares of the capital stock of the company, amounting to \$400, to be paid in lumber, at his own sawmill, at a certain agreed rate. He undoubtedly had the option to pay for the amount of his subscription in that way, and the company so understood it, and were acting in good faith when they called upon him for the lumber. We can not see the force of the argument that, because his subscription was, by the consent of the company, to be paid in that manner, he did not become a stockholder until payment was made in full. The company would necessarily need plank for their road, and they had as much right to buy from the defendant as from any other person, and we are unable to perceive any difference between paying him with his own subscription money, and with any other funds belonging to them. He had the option of paying by delivering lumber at his mill in discharge of his contract, but when he first neglected, and then refused to avail himself of it, it became an obligation to pay money, and the company had the right, as in other cases, after the sale of his stock, as prescribed in their charter, to sue him, in debt, for the sum thus ascertained to be the balance. *Hamilton v. Eller*, 33—276. If this view of the case be correct, the cases of *Grandy v. Small*, 48 N. C., 8, and *Cole v. Hester*, 31 N. C., 23, referred to by defendant's counsel, have no application.

Per Curiam.

Judgment affirmed.

To the same effect, *Hargrave v. Smith*, 62—165; *Simmons v. Cahoon*, 68—303; *supra*, 227; *Austin v. Miller*, 74—274; *supra*, 232; *Lackey v. Miller*, 61—26; *Fort v. Bank*, 61—417; *Speer v. Cowles*, 72—265. Before the time of performance the choice is with the promisor; after the time is past, it is with the promisee. *Homesley v. Elias*, 75—p. 573; 3 Page Cont., secs. 1391, 1392; *Harriman Cont.*, sec. 262; 2 Pars. Cont. (9 Ed.), 804, 809; 9 Cyc., 647; 29 L. R. A., 849.

If a person contract to do one of two things, and one is possible and the other not, he must do the former. If both are possible at the time of the contract and one becomes impossible afterwards, the liability will depend upon the intention, 9 Cyc., 633, 647; *Clark Cont.*, 474 and note; 3 Page Cont., sec. 1380, 1381.

6. Impossibility of performance.

1. AT THE TIME OF THE CONTRACT, *Ante* (86).
2. CREATED BY ONE OF THE PARTIES, *Ante* (246).

3. SUBSEQUENT IMPOSSIBILITY.

(260) CLANCY v. OVERMAN,

18 N. C., 402—1835.

Action of covenant upon an apprentice bond. The plaintiff bound a negro boy to the defendant for three years, to learn a trade, with condition that the boy should serve faithfully and obey; the defendant covenanted to "teach and instruct, or cause to be taught and instructed, the said negro boy, the art and mystery of the coach-making business." The breach alleged was that the defendant did not teach the boy the trade. The defendant offered evidence that he made an honest effort to teach the boy, and the boy would not obey him and would not learn. The court charged that the defendant's covenant was absolute, and he could not excuse failure to perform by the want of capacity in the boy, but this might be considered in estimating damages. Judgment for plaintiff, and defendant appealed.

GASTON, J. There is a well-known distinction between obligations imposed by the law, and those created by express contract. When the law imposes a duty, and the party charged is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party, by his own contract, imposes unconditionally a duty or charge upon himself, he is bound to perform it, or answer in damages for its nonperformance, notwithstanding any accident by inevitable necessity. In the latter case, the contract constitutes the law between the parties, and if it contain no exception, none will be presumed. This court agrees, therefore, with the Judge below, in holding that the engagement of the defendant was absolutely binding to the extent of that engagement; and it is also of opinion with him that the covenants of the respective parties to this indenture were mutual and independent. But we do not concur in the construction which was given below to the covenant of the defendant. It seems to us that an engagement to teach the apprentice, or to cause the apprentice to be taught, a trade, is not an engagement that the apprentice will learn that trade. If it were so, then had the apprentice died on the day succeeding the execution of the indenture, or had been visited by an infirmity which utterly disabled him to learn, or had

obstinately resisted every proper effort to make him learn, the covenant would have been broken, and the defendant responsible in damages for the breach. Nor do we think that in such a case these circumstances should avail to lessen the damages; for if an individual deliberately bind himself to insure a certain result, and the obligation is broken, the extent of the injury forms the measure of damages, however the performance may have been defeated. It would be doing violence, we think, to the words found in this covenant, to regard them as stipulating for more than faithful, diligent and skillful instruction. The case of *Winston v. Linn*, 4 F. C. L. Rep., 131, which has been cited for the plaintiff, does not conflict with this opinion. It was there held that the covenants were mutual and independent, and that disobedience on the part of the apprentice, and his temporary withdrawal from the service of the master, did not warrant the latter in insisting that the indenture was dissolved. It decides no more; and the learned Mr. Justice *Bayley*, who presided on that occasion, and whose views are given more *in extenso* than those of his brethren, expressly says, "If he (the apprentice) had continued to absent himself to the end of the term, there can be no doubt but *that* would have been an answer to the action."

The court is also of opinion that the evidence offered of the acts and declarations of the apprentice was improperly rejected. They may not have been of great importance, and they are not evidence because of any credit due to the party by whom they were done or uttered; but his acts are evidence because they are his acts; and his declarations are evidence because his disposition and temper are subjects of investigation; and these can not be ascertained but through the medium of such external signs.

The judgment below is to be reversed, and a new trial awarded.

To the same effect is *Wyatt v. Morris*, 19—108; *Bell v. Walker*, 50—43; 3 Page Cont., secs. 1362, 1363, 1375 to 1379; 14 L. R. A., 215; 15 L. R. A., 450; 9 Cyc., 688.

Common carriers.—Carrier's responsibility is discharged by act of God, or of the public enemies, but whatever might have been prevented by human foresight, he is liable for, as where the injury was due to a defective rudder of a ship. *Backhouse v. Sneed*, 5—173; *Harrell v. Owens*, 18—273; *Mizell v. Burnett*, 49—249; *Capehart v. R. R.*, 81—438.

(261) *LAWING v. RINTLES*,

97 N. C., 350, 2 S. E., 252—1887.

Civil action on a contract. The plaintiff contracted to furnish material and build certain houses for the defendant, in the city of Charlotte, to be completed by the 1st of October, and the defendant was to pay him \$2,950, in installments, as the work was performed. The plaintiff did work and furnished material to the

amount of \$2,720, and the defendant had paid him the sum of \$2,048; but before the buildings were completed, they were destroyed by fire without any negligence or default of the plaintiff, and this action is brought for \$672, which the plaintiff claims is still due him for the work done before the houses were destroyed. The defendant contends that the plaintiff can not recover because he had not performed his part of the contract. The defendant had a policy of insurance on the houses, while the plaintiff had no insurance.

His Honor intimated that the plaintiff could not recover, and the plaintiff submitted to a nonsuit and appealed.

DAVIS, J. It is contended for the plaintiff that he was entitled to pay for the material furnished, and the work and labor done on the buildings up to the time of their destruction by fire, and for this he cites many authorities; but upon examination they do not sustain the position. *Brewer v. Tysor*, 48 N. C., 183, referred to is direct authority the other way. The court say that the contract being an entire one, the plaintiff can not recover unless he avers and proves an entire performance. The plaintiffs sought to relieve themselves of the obligation to perform the entire contract, by reason of sickness, upon the maxim, that *actus Dei neminem facit injuriam*, but the court said that did not excuse them, but when the case was again before the court at a subsequent term, 50 N. C., 173, it appeared that the contract was for work divided into three separate parts, for each of which a separate price was to be paid, and the court said there was no reason why the plaintiffs should not be paid for the work done on the two parts which had been finished, according to the contract.

Instead of the plaintiff's right to recover, the weight of authority would require him to rebuild, and thus perform his contract.

In *Adams v. Nichols*, 19 Pick., 275, it is said: "It is not material to consider whose property the house was before the conflagration. The defendant had contracted to build and finish the house on the plaintiff's land. After the conflagration he might have proceeded under the contract, and if he completed the house, according to the terms of his agreement, the plaintiff would have been bound to fulfill his part of the contract."

In this case it was held that the contractor was not discharged by the conflagration from the duty to build. In *School District v. Dauchy*, 25 Conn., 531, the defendant had contracted to build a schoolhouse by a day named—just before the day, it was set fire to by lightning and entirely destroyed. It was held that the non-performance of the contract was not excused. The whole question seems to be well and fully considered in the case of *Tomkins v. Dudley*, 25 New York, 272. The defendant had guaranteed the

performance of a contract by a builder, to erect a schoolhouse, which he failed to perform. The court says: "In justification of such nonperformance, he alleges the destruction of the building by fire, an inevitable accident, without any fault on his part. The law is well settled that this is no legal justification for the non-performance of the contract." This is the conclusion at which the court arrived in that case, after a review of numerous decisions upon the question, and we are well satisfied in this case that the plaintiff has no right to recover.

When the contract was entered into, he could have protected himself against loss by fire, either by a stipulation in the contract or by insurance, but as this was not done, it is his misfortune. The position that the plaintiff was entitled to the money received by the defendant upon the policy of the insurance which she had on the building, was not seriously insisted upon in this court. By the insurance she was only indemnified against loss on account of the payments which she had made.

There was no error, and the judgment must be affirmed.

See *Keel Construction Co.*, 143—429; *Coal Co. v. Ice Co.*, 134—p. 583; *Dermott v. Jones*, 2 Wall., 1; 12 L. R. A., 571; *Clark Cont.*, 472; 9 Cyc., 625; *Whitlock v. Lumber Co.*, 145—120; *Milske v. Steiner Mantel Co.*, 103 Md., 235, 63 Atl., 471, 5 L. R. A. (N. S.), 1105.

(262) STEAMBOAT CO. v. TRANSPORTATION CO.,

166 N. C., 582, 82 S. E., 956—1914.

Action upon contract. The plaintiff leased to the defendant a steamship to be used only on Sundays from June 23 to September 29, 1912, for the sum of \$80 per Sunday, payable "on the 1st and 15th of each month after said steamship has been so used by said party of the second part during said term." The defendant used the steamer until August 4, when it was destroyed by fire. The plaintiff had received payment for all the trips made except two, and he sues for these payments. The defendant resisted payment on the ground that the contract was entire and that the plaintiff had no right of action without showing performance for the whole time covered by the contract, and also set up a counterclaim for damages for failure to perform the contract. A motion of nonsuit was allowed, the defendant withdrew his counterclaim, and plaintiff appealed.

HOKE, J. Where parties contract with reference to specific property and the obligations assumed clearly contemplate its continued existence, if the property is accidentally lost or destroyed by fire or otherwise, rendering performance impossible, the parties are relieved from further obligations concerning it. As to the ex-

ecutory features of such an agreement, the destruction of the property, without fault, will amount to a discharge of the contract. 3 Page on Contracts, sec. 1730; Clark on Contracts (2d Ed.), p. 475.

Under the circumstances as stated and in reference to the adjustment of rights and liabilities of the parties by reason of stipulations already performed, if the contract in express terms or from its nature is entire and indivisible, requiring full performance before anything is due, then no recovery can be had, but, if the contract is severable and substantial benefit has been received under it and enjoyed by one of the parties, this must ordinarily be accounted for, either according to the rates fixed by the contract or under a *quantum meruit*, as the case may be, and if, under the terms of the contract, the work done or the services rendered are to be paid for by installments or at stated periods, these installments or payments being fixed with regard to the value of the work done or as specified portions are performed, in that event, if the property is destroyed, the claimant may recover for the installments due or for the portion of the work done as for an amount already earned.

These general principles are in accordance with decided case here and in other jurisdictions. *Keel v. Construction Co.*, 143 N. C., 429-432, 55 S. E., 826; *Tussey v. Owen*, 139 N. C., 457, 52 S. E., 128; *Coal Co. v. Ice Co.*, 134 N. C., 574, 47 S. E., 116; *Lawing v. Rintles*, 97 N. C., 350, 2 S. E., 252; *Chamblee v. Baker*, 95 N. C., 98; *Gorman v. Bellamy*, 82 N. C., 496; *Brewer v. Tysor*, 50 N. C., 173; *Viterbo v. Friedlander*, 120 U. S., 707, 7 Sup. Ct., 962, 30 L. Ed., 776; *McCaslin v. Mfg. Co.*, 155 Ind., 298, 58 N. E., 67; *Dexter v. Norton*, 47 N. Y., 62, 7 Am. Rep., 415; *Wells v. Calnan*, 107 Mass., 514, 9 Am. Rep., 65; *Stewart v. Stone*, 127 N. Y., 500, 28 N. E., 595, 14 L. R. A., 215; and the two cases of *Lawing v. Rintles*, *supra*, and *Keel v. Construction Co.*, very well illustrate the different positions as applied to the facts of the present appeal. In *Lawing's Case*, a contract to construct certain buildings as a whole was held to be entire and, on accidental destruction of buildings before completion, it was held that the contractor could not recover any portion of the price. In the later case of *Keel v. Construction Co.*, the contract was to construct a building, the payment to be by certain installments due as specified portions of the structure were completed; the apportionment having evident reference to the portion of the work done, and, in the opinion, the general principles applicable were stated as follows:

"When one contracts with the owner of a lot to furnish all the materials and build and construct a house thereon for a certain price, the contract being entire and indivisible, if the structure, before completion, is destroyed by fire, without fault on the part of

the owner, and the contractor, being given the opportunity, refuses to proceed further, in such case, he is liable to refund any money which may have been paid him on the contract, and also for damages for its nonperformance. *Brewer v. Tysor*, 48 N. C., 181; *Lawing v. Rintles*, 97 N. C., 350, 2 S. E., 252; *Beach's Modern Law of Contracts*, sec. 232, citing *Tompkins v. Dudley*, 25 N. Y., 272, 82 Am. Dec., 349. And this principle will not be affected by the fact that the money is to be paid by installments, if the price is entire for a completed building and these installments are arbitrary and fixed without any regard to the value of any distinctive portion of the work done. *School Trustees v. Bennett*, 27 N. J. Law, 513, 72 Am. Dec., 373. But, if the contract is divisible and severable, if the price is not entire for a completed building, but is payable by installments, these installments being fixed with regard to the value of the work done, or as certain portions of same are finished, in that event, if the structure be destroyed by inevitable accident, 'the builder is entitled to recover for the installments which have been fully earned,' but it seems that he has no claim for a proportional part of the next installment which has been only partially earned. *Brewer v. Tysor*, 50 N. C., 173; *Beach*, *Modern Law*, citing *Richardson v. Shaw*, 1 Mo. App., 234. In this well-considered case, *Lewis*, Judge, delivering the opinion, says: 'The true principle which controls such a case as this is clearly stated in *Addison on Contracts*, 452: "If the contract price of the building is to be paid by installments on the completion of certain specified portions of the work, each installment becomes a debt due to the builder as the particular portion specified is completed; and, if the house is destroyed by accident, the employer would be bound to pay the installments then due, but would not be responsible for the intermediate work and labor and materials."'

And such in effect is the case presented here, the contract showing that plaintiff was to be paid \$80 per Sunday, payable on the 1st and 15th of each month, after such steamship has been so used by said party of the second part during said term," and, in further support of the position that the price per Sunday was to be regarded as a severable item, it is provided further in the contract that in case the weather was such as to prevent the trip on any given Sunday, the stipulated price for such day was not to be required.

On the facts in evidence, therefore, the plaintiff, in any aspect of the case, had a definite claim for \$160, earned under the provisions of the contract, which entitled him to bring suit and, if defendant desires to insist that it has been wronged by plaintiff's failure to perform further the position should be made available

by counterclaim, the course suggested and approved in some of the authorities cited. See *Coal Co. v. Ice Co.*, 134 N. C., 579, 47 S. E., 116; *Chamblee v. Baker*, *supra*; *Gorman v. Bellamy*, *supra*.

In reference to this counterclaim of defendant, it may be well to note that the obligations of an ordinary business contract are imperative in their nature. This principle, which relieves a party to such a contract by reason of the destruction of the property with which it deals, is sometimes treated as an exception; the general rule being the other way. 9 Cyc., pp. 627-629. Before a party can avail himself of such a position, he is required to show that the property was destroyed, and without fault on his part. For this reason, and, further, because by the terms of the present contract the care and custody of the property was left with plaintiff, if it is established that plaintiff has failed to further perform the executory features of this agreement, the burden would be on plaintiff to show that the steamer was destroyed by fire, and that the plaintiff and its agents were in the exercise of proper care at the time.

New trial.

(263) ALLEN v. BAKER,

86 N. C., 91, 41 A. R., 444—1882.

Civil action for breach of marriage contract. While the action was pending the defendant died, and his administrator was made a party; the court held the action did not abate. The defendant promised to marry the plaintiff, and afterwards finding out from his physician that he had a disease which rendered him unfit for the married life, he asked to have the marriage postponed, and the plaintiff's parents assented. At the time of his answer to the action he still had the disease, and at no time had been in a condition to marry, as he alleged. There was judgment for the plaintiff, and defendant appealed.

RUFFIN, J. In *Shuler v. Millsaps*, 71 N. C., 297, the Act of 1868-69 (Bat. Rev., ch. 45, secs. 113, 114), received a construction by this court, and it was held that by reason of the provisions thereof, an action for a breach of promise of marriage did not abate upon the death of the defendant, but survived as against his personal representative. We feel ourselves bound by that decision, though were it an open question, we are inclined to think we should hold differently, in a case like that and the present one, in which no special damages were laid in the complaint.

As stated by His Honor, contracts of this sort differ from ordinary contracts, as for the sale of goods and the like, in which damages are awarded according to some well-settled rule of the courts, and when the financial condition of the defendant can have no

bearing on the question. About the only instruction that could be given was the general one which His Honor gave, to the effect that all the circumstances of the case and the surroundings of the parties should be fairly considered, and just compensation allowed for the anguish endured by the plaintiff, and the injury inflicted upon her prospects in life. In estimating them, it is proper, according to the great weight of modern authority, that the jury should consider the pecuniary condition of the defendant as some standard by which to measure her disappointment, and the extent of her loss. *Harrison v. Swift*, 13 Allen, 144; *Sprague v. Craig*, 51 Ill., 288; *Sedgwick on Damages* (7 Ed.), 146. The same authorities are full to the point, that the jury should take into consideration whatever mortification and pain of mind the plaintiff may have suffered, resulting from a refusal of the defendant to fulfill his promise. So that, in the judgment of this court no error was committed with reference, either to the testimony admitted, or the instructions given to the jury, of which the defendant can rightly complain.

We are of opinion, however, that the issues which were submitted do not cover the whole merits of the case, and that without other findings on the part of the jury it is impossible to do full justice to the rights of both parties. Assuming it to be true, as we do from the verdict, that the plaintiff did not give her assent to a postponement of the marriage, and that defendant's intestate refused to consummate it, it is still important to know from what cause that refusal proceeded—whether from a disregard of the plaintiff's feelings and his own plighted word, or from a consciousness supervening his engagement, that he labored under a loathsome disease, incurable in fact, and of such a nature as to render him unfit to enter the marriage relation with anyone. In his answer he alleged that his failure to comply really depended upon such a conviction on his part, and if such be true, this court could not hold that he was responsible in damages by reason thereof. We can not understand how one can be liable for not fulfilling a contract, when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself.

However once doubted, it is now generally conceded that if the performance of a contract be rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance; and such a stipulation will be understood to be an inherent part of every contract. It is likewise true that whenever the main part of an executory contract becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible *in toto*. Why

should not the same principle apply to a contract, the fulfillment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them?

Our attention was called by counsel to the decisions made by the court of Queen's Bench, and afterwards by the court of Exchequer, in the case of *Hall v. Wright*, 96 Eng. C. L. Rep., 746, where a defendant was held liable, who, after promise and before breach, became afflicted with bleeding from the lungs, whereby he became incapable of marrying without imminent hazard to his life. In making that decision, the court treated the contract for marriage as they would any other contract, saying, that though in bad health, the man might nevertheless so far perform his contract as to marry the woman, and thus secure to her the status and social position of his wife, and endow her with a wife's interest in his estate; and if unwilling to do this, he should compensate her in damages for his refusal. We confess that we are not satisfied with this course of reasoning. In the first place, it is not possible to assimilate a contract like this to an ordinary contract for personal service, which, if not capable of being wholly performed, may be partially so; and in the next place, we believe it to be contrary to the understanding of men generally, that the acquisition of property or social position, either does or should constitute a main and independent motive and inducement for entering into such a contract.

The usual, and we may say legitimate, objects sought to be attained by such agreements to marry, are, the comforts of association, the *consortium vitæ*, as it is called in the books; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise—the main part of the contract having become impossible of performance, the whole will be considered to be so.

In Pollock on Contracts, 370 (a book in which the principles of contract are treated more philosophically than by any author known to us), the decision in *Hall v. Wright*, *supra*, is referred to, with the remark that it is so much against the tendency of the later cases as to be now of little or no authority, beyond the mere point of pleading decided therein.

We are not unmindful of the fact that the malady under which the party in this instance labored, was the legitimate result of his

own imprudence; or, that the evidence offered showed that the disease was upon him, when he gave his promise to the plaintiff. As to the first point, the same might have been said of consumption, or any other fatal and disqualifying disease; it too may have proceeded from imprudence and sinful indulgence, but if contracted when he owed no duty to the plaintiff, we can not see how that can vary the case. The other is a point of more consequence; if knowing, or by using extraordinary diligence he might have known, that his infirmity was incurable, or of long duration, he entered into a contract with the plaintiff, his subsequent incapacity to perform it would furnish no excuse for its breach—so far from it, it would amount to a gross aggravation. But, on the other hand, if he had reason to believe his disease was a temporary one, which might be healed in time to enable him to complete his agreement, then the law would hold him excusable for a breach resulting from a knowledge subsequently attained, that his disease was in fact not only incurable, but such as must necessarily be communicated to his wife, and probably to their offspring, in case he made her such and availed himself of his conjugal rights.

The law will constrain no man to assume a position so full of peril, as to have placed within his reach the lawful means of gratifying a powerful passion, at the risk of another's health or life, and the possibility of bringing into the world children in whose constitution the seeds of a father's sin shall lurk. As said in the dissenting opinion in *Hall v. Wright*, it would seem to be strange that a man should be liable in damages for not doing that which is against all law, human and divine.

Under the rules, without sending the case back, and without depriving the plaintiff of the benefit of the verdict in her favor upon the issues already submitted, the court directs these further issues:

1. Did the defendant's intestate refuse to perform his contract of marriage with the plaintiff, because of his being so diseased as to be unfit for the married state?

2. Was he diseased at the time of making his agreement with the plaintiff; and if so, had he reason then to believe that his disease was permanent, or likely to be of long duration?

This course we pursue by virtue of the example set in *Barnes v. Brown*, 69 N. C., 439.

Per Curiam.

Judgment accordingly.

Where a person by express contract undertakes to do something which afterwards becomes impossible, he is not discharged, but must answer in damages. To this rule there are three exceptions: (1) Where the impossibility arises by operation of law; (2) where the continued existence of the subject-matter is contemplated; (3) where the contract is for personal services to be rendered only by the person promising. *Taylor v. Caldwell*, 32 L. J. Q. B., 164, 6 E. R. C., 603; *Beebe v. Johnson*, 19 Wend., 500, 32 A. D.,

518; Cordes v. Miller, 39 Mich., 581, 33 A. R., 430; Dewey v. School Dist., 43 Mich., 480, 38 A. R., 206; Huett & Smith Mfg. Co. v. Chic. Edison Co., 167 Ill., 233, 59 A. S. R., 272; Milske v. Steiner Mantel Co., 103 Md., 235, 63 Atl., 471, 5 L. R. A. (N. S.), 1105; Mendenhall v. Davis, 52 Wash.; 100 Pac., 336, 21 L. R. A. (N. S.), 914; Taulbec v. McCarty, 144 Ky., 199, 137 S. W., 1045, Ann. Cas., 1913 A, 456; Dermott v. Jones, 2 Wall., 1; Goodbread v. Wells, 19—476; West v. Hall, 64—43; Whitlock v. Lumber Co., 145—120; 6 R. C. L., 978, 997; 1 Am. & Eng. Encyc., 588; 7 *Ibid.*, 147; 9 Cyc., 625; 16 L. R. A., 858; 23 L. R. A., 707; Clark Cont., 472; Pollock Cont. (3d Ed.), 523; Page Cont., sec. 1364 *et seq.* In the case of landlord and tenant, the tenant is not liable for accidental damages to the premises, unless he so contract. Revisal, sec. 1992; and a lease to repair will not bind the lessee to repair or rebuild when the house is destroyed or damaged to more than half the value, by accidental fire not occurring from his negligence. *Ibid.*, sec. 1985.

CHAPTER IV.

DISCHARGE BY OPERATION OF LAW.

Sec. 1. Merger.

(264) COSTNER v. FISHER,

104 N. C., 392, 10 S. E., 526—1889.

The plaintiff brought his action before a justice of the peace for \$135.35, due by account and note under seal. When the case came on for trial he entered a *nolle prosequi* as to the cause of action on the note. The plaintiff testified that the bond was given for the amount due upon the account, and that he accepted it on condition that the defendant would pay him \$10 a month; that the bond was intended only as security; and that he did not receipt the account. The court held that "the cause of action upon the account was merged into the note, and that, the same not being due, the plaintiff could not recover." There was a judgment for defendant, and plaintiff appealed.

SHEPHERD, J. His Honor was clearly right in holding that the account was merged in the bond. *Gibson*, C. J., in *Jones v. Johnson*, 3 Watts & S., 277, says: "Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher; and, being by act of the law, it is dependent on no particular intention. . . . No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging into a judgment on it, or passing *in rem judicatum*. Neither would an agreement, however explicit, prevent a promissory note from merging into a bond given for the same debt, by the same debtor; for to allow a debt to be at the same time of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation, unsettle distinctions, and lead to embarrassment in the limitation of actions," etc. This high authority fully sustains the ruling of His Honor.

Even if there were no merger, the taking of the bond payable at a certain time implies an agreement to suspend his remedy on the account for that period. 2 Daniel Neg. Inst., sec. 1272; *Putnam v. Lewis*, 8 Johns, 304; *Frisble v. Larned*, 21 Wend., 450, and other cases cited in *Bank v. Bridgers*, 98 N. C., 67, 3 S. E. Rep., 826. There is

No error.

For other cases of merger by judgment, see *Gregory v. Hooks*, 33—371; *Rufty v. Claywell*, 93—306; *Gibson v. Smith*, 63—103; *Walton v. Pearson*, 85—34; *Grant v. Burgwyn*, 88—95; *Platt v. Potts*, 33—266.

Between the parties to the action the judgment is a merger of the instrument sued on; but as to sureties and endorsers not parties to the action, is not a merger. *Bank v. Lumber Co.*, 123—24; *Hicks v. Davis*, 68—231. A judgment rendered upon a former judgment which was docketed and a lien on the homestead of the debtor, does not merge the former judgment so as to lose the lien; "security of higher nature extinguishes inferior securities, but not securities of an equal degree." *Springs v. Pharr*, 131—191. Where a contract of employment payable in installments, is broken by the employer, the employee may sue for installments due, but if he omit one and sue for a later one, the former is merged in the judgment; but not so as to installments not due. *Smith v. Lumber Co.*, 142—26; 140—375.

Where there was an oral contract for shipment which defendant failed to comply with, and afterwards shipment was made for which a bill of lading was given, the former contract is not merged in the latter. *Absher v. R. R.*, 108—344; *Hamilton v. R. R.*, 96—398. A bond can not merge a simple contract except as to those who are bound by it; if one give a bond for his simple contract it is merged; but if he gives a bond for his own bond, it is no merger; so if he give a bond for the simple contract debt of another. *Spear v. Gillett*, 16—470. A promise made after a covenant is merged, upon the same ground that a promise made before is merged, when the promise and the covenant are precisely the same, because the covenant, being a deed, is the surest and highest evidence. *Burnes v. Allen*, 31—370. Merger of simple contract in specialty, *Horton v. Child*, 15—460. For discussion generally, see 3 *Page Cont.*, secs. 1352, 1353; 20 *Am. & Eng. Encyc.*, 596; *Mordecai's Lectures*, 850; 9 *Cyc.*, 633; 6 *R. C. L.*, 920; *Pollock Cont.*, 874.

Sec. 2. Alteration of instrument.

(265) *LONG v. MASON*,

84 N. C., 15—1881.

This was a civil action upon a bond made by defendant's intestate as surety to one John B. Kerns, for \$100, payable to the plaintiff as guardian of T. M. Kerns. The words "at ten per cent" had been written in the left lower corner of the bond, after it had been signed by both principal and surety, and was done by the principal, in the absence of the surety and without his knowledge or consent, and without the knowledge or consent of plaintiff; but it was done at the suggestion of the ward, who was about nineteen years old. The defense was that this alteration rendered the bond void, and the court so held, giving judgment for the defendant, and the plaintiff appealed.

RUFFIN, J. An alteration of a bond in a material part by a party to it, vacates the same, except as to parties consenting thereto. *Davis v. Coleman*, 29—424; *Draper v. Wood*, 112 *Mass.*, 315. An addition of the words "interest at six percent," written in a corner of a bond after it had been signed, is an alteration of it in a material particular. 3 *Addison on Cont.*, sec. 1280. The intent with which the alteration is made seems, according to the weight

of authorities, to be immaterial; but however that may be, it has been decided by this court in *Dunn v. Clements*, 52 N. C., 58, that whenever a material alteration has been made, a presumption of fraud arises, and remains until rebutted. There was no evidence offered on the trial to remove this presumption.

We therefore concur with His Honor in the opinion that the defendant was entitled to judgment.

No error.

Affirmed.

(266) MATHIS v. MATHIS,

20 N. C., 55—1838.

DANIEL, J. The plaintiff brought his warrant against the defendant "to answer in a plea of debt of twelve 50-100 dollars and interest, due by note." The defendant pleaded "*non est factum*." On the trial of the issue it was proved that the defendant executed to the plaintiff a bond for \$7.50, which bond it was alleged had been altered by a stranger from \$7.50 to the sum of \$12.50. The plaintiff's counsel requested the court to instruct the jury that if they were satisfied that the fact was so, to find a verdict for \$7.50 and interest. The court refused so to charge; but told the jury that an alteration of a deed or bond by a stranger in a material part, destroyed the whole validity of the instrument, and that the jury were not at liberty to render a verdict for the true amount, however clearly it might be shown.

The defendant's plea denied that he executed the bond of \$12.50 as described in the warrant. The plaintiff replied that he did, and upon this issue the parties went to trial. The plaintiff, having warranted upon a bond for \$12.50, can not sustain the affirmative side of the issue by showing that the defendant had executed to him a bond for \$7.50, even if the latter bond had never been altered. His *probata* did not correspond with his *allegata*. The evidence in fact was inadmissible to support the plaintiff's side of the issue. But if the plaintiff had warranted upon a bond for \$7.50, alleged to have been destroyed by accident, as an excuse for not making profert, his evidence then would have been proper. *Powers v. Wave*, 2 Pick. Rep., 458. The alteration of a deed or bond in a material part by a stranger does not destroy any vested rights; it only changes the mode of proof of the contents of the bond. *Chitty's Gen. Pract.*, 304; *Byles on Bills*, 173. But the plaintiff did not so warrant, and he is not, in this warrant and pleadings, entitled to recover the sum of \$7.50, proved to be due on a bond executed for a different sum than the bond described in the warrant.

Per Curiam.

Judgment affirmed.

(267) BURGESS v. BLAKE,

128 Ala., 105, 86 A. S. R., 78—1900.

This was a suit to foreclose a mortgage, which included certain lands claimed by defendant's wife; one of the deeds under which she claimed was written entirely in violet ink, and changes were made in black ink.

SHARPE, J. . . . Recognizing the principle as declared in *Sharpe v. Orme*, 61 Ala., 263, that an alteration in a deed will be presumed to have been made prior to its execution, unless it be of a character to excite suspicion that it occurred afterward, yet we are of opinion, treating the question as one of fact, that this alteration must, in the absence of explanatory proof, be held to have been made after the deed was executed. Though it may have been made by the grantor for the purpose of conveying the additional 40 acres and without fraudulent intent, yet for the lack of attestation of acknowledgment which the statute makes essential to a conveyance of land, no title to the added 40 acres passed.

Unlike writings which evidence executory contracts, a deed, so far as it operates as a conveyance, is not avoided by alteration. Having accomplished transmission of the title, the grantee is not divested of title by alteration of the deed, however, its covenants may be affected. The original instrument remains a muniment of title, and with or without explanation is evidence of title, and may be used as such. The question of its admissibility was well decided in *Alabama State Land Co. v. Thompson*, 104 Ala., 570, 53 A. S. R., 80, 16 So., 440, where conflicting authorities are referred to and discussed. See, also, 2 A. & E. Enc., 204; *Burnett v. McCluey*, 78 Mo., 676. . . .

For discussion of the effect of alteration generally, see note to the above case in 86 A. S. R., 80. In *Wicker v. Jones*, 159—102, 74 S. E., 81, 40 L. R. A. (N. S.), 69, the rule is stated as to the presumption in favor of the alteration before execution; see also *Tharp v. Jamison*, 134 N. W., 583, 39 L. R. A. (N. S.), 100. The distinction between executed and executory contracts, as affected by alteration, is given in *Chessman v. Whittemore*, 23 Pick., 231. In *Martin v. Buffaloe*, 121—34, it was held that an alteration made by filling up blanks in a deed, by consent of parties, did not invalidate it, but the burden of showing the grantor's consent was on the grantee. A executed a deed to B, and afterwards without A's knowledge or consent the name of C was substituted for B's, and the deed was thus registered; held, that the deed was void, *Perry v. Hackney*, 142—368; and where such change was made to defraud creditors, the court will not aid the party to restore the deed. *Respass v. Jones*, 102—5. Where a wife gave a mortgage to secure her husband's note, and without her knowledge, he "raised" the note, this made the note void as to her, but the mortgage was good for the original amount. *Cheek v. Nall*, 112—370; *Howell v. Coleman*, 117—77.

It has been held in some cases that an alteration in an immaterial part, if made by the party claiming benefit under it, avoids the instrument. *Nunnery v. Cotton*, 8—222; *Pullen v. Shaw*, 14—241; but it is now the rule that

the alteration must be material. *Smith v. Eason*, 49—34. When the alteration affects the character of the instrument, it is material. 49—34. Cutting off the name of one of the makers and substituting another is a material change. *Davis v. Coleman*, 29—424. Adding the words “in specie” to a note in 1865, was a material alteration. *Darwin v. Rippey*, 63—318; an attempt to retrace the name of the obligor with ink, and a change in one letter which does not change the name, is immaterial. *Dunn v. Clements*, 52—58. Putting the name of a subscribing witness to a bond is not a material alteration. *Blackwell v. Lane*, 20—245; but see *Clark Cont.*, 481. Placing the name of a P. O. in S. C. where the contract was made, is not material, though being a S. C. contract might change the rate of interest. *Houston v. Potts*, 64—33. If the penalty is inserted in a guardian bond after it is executed, it is invalid. *Rollins v. Ebbs*, 137—355, but on a rehearing in 138—140, it was held to be binding. The rule for alteration does not apply to a receipt unless it is also a contract. *Wilson v. Derr*, 69—137.

For effect of alteration generally, see *Clark Cont.*, 479; 2 *Am. & Eng. Encyc.*, 185; 3 *Page Cont.*, sec. 1511 *et seq.*; *Mordecai's Lectures*, 850; 2 *Cyc.*, 137; *Master v. Miller*, 4 T. R., 320, 2 H. Bl., 140, 2 E. R. C., 669; 6 E. R. C., 615; *Pollock Cont.*, 845; 1 R. C. L., 966.

Sec. 3. By bankruptcy.

This is regulated by statute, but the effect is given in *Parker v. Grant*, 91—338, “A debt discharged in bankruptcy has no longer any legal existence. It is extinguished by the discharge; and the only instance in which it has been recognized as having any vitality is, when after discharge it is held to be a sufficient moral consideration to support a promise to pay it.”

What debts are discharged.—All provable debts except, 1. Taxes; 2. Liability for false pretense, malicious injury, alimony, support of family, seduction and criminal conversation; 3. Those not duly scheduled, unless such creditors had notice of the proceeding; 4. Any liability created by fraud, etc., in any fiduciary capacity. *Brandenburg on Bankruptcy*, sec. 418. Provable debts discharged. *Knabe v. Hayes*, 71—109; *Blum v. Ellis*, 73—293; *Withers v. Stinson*, 79—341; *Sumrow v. Black*, 87—103; *Wall v. Fairley*, 77—105; *McMinn v. Allen*, 67—131; *Elliott v. Higgins*, 83—459. Debts of fiduciary character not discharged. *Calvert v. Peebles*, 80—334; *Shields v. Whitaker*, 82—516; *Councill v. Horton*, 88—222; *Mock v. Howell*, 101—443; but it can not be enforced against the homestead. *Simpson v. Houston*, 97—344; where an officer made default and gave his note for the amount, and judgment was taken on the note, bankruptcy was a discharge. *Comrs. v. Staley*, 82—395; in *Arrington v. Arrington*, 131—143, it was said that a decree for alimony was discharged, but see above; owelty of partition is not discharged, *Walker ex parte*, 107—340, but a debt for purchase-money is. *Hoskins v. Wall*, 77—249; discharge of principal does not affect surety. *Bank v. Simpson*, 90—467; but see *Simpson v. Simpson*, 80—332.

An oral promise to pay the debt after discharge was valid. *Hornthal v. McRae*, 67—21; *Fraley v. Kelly*, 67—78, 79—348, 88—228; *Henly v. Lanier*, 75—172; the promise must be direct and unequivocal. *Kull v. Farmer*, 78—337; *Riggs v. Roberts*, 85—151; *Shaw v. Burney*, 86—83. The promise must now be in writing. *Revisal*, 978.

Bankruptcy laws discharge the contract, while insolvent laws liberate the debtor, *Brandenburg*, sec. 386. For discussion of subject generally, see 16 *Am. & Eng. Encyc.*, 769, *et seq.*; *Sturges v. Crowninshield*, 4 *Wheat.*, 122; *Collier Bankruptcy*, 308; 3 R. C. L., 316.

CHAPTER V.

REMEDIES FOR BREACH.

Sec. 1. By action at law for damages.

(268) LEWARK v. RAILROAD CO.,

137 N. C., 383, 49 S. E., 882—1905.

Action for damages for failure to deliver ice. Judgment for the plaintiffs for less than they demanded; they appealed.

BROWN, J. On November 14, 1902, the plaintiffs had shipped from Norfolk, Va., to themselves at Church Island, N. C., two tons of ice over the defendant's line. The ice was never delivered, although by due course it would have reached Church Island the same day it was shipped. It was admitted the plaintiffs were dealers in fish and desired the ice for their own use.

The sole exception in the record presents the question as to the measure of the damage. His Honor in the court below charged the jury that the measure of damages was the value of the ice at Church Island on November 14, 1902. To this instruction the plaintiffs excepted. We find no error in the instruction.

The general rule for the measure of damages is tersely stated in *Ashe v. DeRosset*, 50 N. C., 299: "When one violates his contract he is liable only for such damages as are caused by the breach, or such as being incidental to the act of omission or commission, as the natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made." In the well-known case of *Hadley v. Baxendale*, 9 Exc., 341, the plaintiff sought to recover damages which grew out of the special circumstances under which the contract was made, *i. e.*, the stopping of plaintiff's mill in consequence of the non-delivery of a shaft which was necessary to and ordered for its operation. This was refused, and the court says in respect to it: "If the special circumstances under which the contract was made were communicated to the defendant and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract in the special circumstances so known and communicated. But, on the other hand, if these special circumstances were unknown to the party breaking the contract, he at most could only be supposed to

have had in contemplation the amount of injury which would arise generally and, in the great number of cases, not affected by any special circumstances, from such a breach of contract." See also *Boyle v. Reeder*, 23 N. C., 607; *Foard v. Railroad*, 53 N. C., 235.

The plaintiff's contention is that the measure of damages is the loss on fish. Such damages are too remote and could not have reasonably been within the contemplation of the defendant company when it accepted the ice for shipment. If everyone were answerable for all the consequences of his acts, no one could tell what were his liabilities at any moment." 3 *Parsons on Contracts* (5 Ed.), 179. "Every defendant shall be liable for those consequences which might have been foreseen and accepted as a result of his conduct, and not for those he could not have foreseen, and therefore under no moral obligation to take into his consideration." *Ibid.*, 180.

When the defendant accepted the ice at Norfolk for shipment it could not foresee that the plaintiff's fish would be spoiled or that the ice could be used for packing fish. The defendant did not know that the plaintiff had any fish at the time the ice was shipped. Nor is there any evidence that the defendant knew it at any time.

If the plaintiffs had shown by evidence that the defendant knew or should have known from facts and circumstances connected with the shipment, or otherwise, that the ice was intended by the plaintiffs for packing fish, the plaintiffs would have brought their case within the exception to the general rule.

We have examined the evidence with care and fail to find any which could reasonably bring to the defendant's knowledge the fact that the shipment was other than an ordinary shipment. It had no knowledge of the special purpose.

Neal v. Hardware Co., 122 N. C., 104, pressed upon our attention by the plaintiff's counsel in his brief and oral argument, differs materially from the case at bar. Tobacco flues are different commodities. Ice is something of general everyday use all the year round and required for many different purposes. Persons in localities where tobacco is cultivated are presumed to know what a tobacco flue is intended for, and if tobacco is not cured promptly when cut, serious loss will result.

In *Sledge v. Reid*, 73 N. C., 440, Mr. Justice *Bynum* says: "The loss of the crop, though following the loss of the mule, was neither a necessary nor natural consequence. . . . The value of the mule taken and the hire of another is the measure of the plaintiff's damage. Anything beyond this would be too remote and conjectural, and would lead the courts into a boundless field of

investigation." See also Wood's Mayne on Damages, secs. 26 and 40. It is useless to multiply authorities, as the measure of damages in contracts for the sale and delivery of personal property has been discussed in many cases in the recent reports of this court, and we find nothing in any of them to support the plaintiff's contention. The judgment of the Superior Court is Affirmed.

Connor, J., concurs in result.

(269) MACE v. RAMSEY,

74 N. C., 11—1876.

Civil action on contract. Defendant contracted to furnish plaintiff a flatboat and hands to transport a party of excursionists, and failed to furnish the boat. The price agreed on was \$4 a day, the usual price. There was a verdict and judgment for the plaintiff for \$210 as damages, and the defendant appealed.

BYNUM, J. The terms of the contract were disputed and it was left to the jury to ascertain what was the contract. Their finding establishes that it was unconditional and as follows: On the 5th of July, 1873, the defendant contracted with the plaintiff to furnish a flatboat and hands, on the morning of the 16th of July for the plaintiff's use on the 16th, 17th and 18th of July to transport passengers, or excursionists from Morehead City to Beaufort, and different points about the harbor, an excursion train being expected at Morehead on the morning of the 16th of July. The price agreed upon for the use of the boat was \$4 per day. The boat was not furnished, and the question was as to the amount of damages the plaintiff was entitled to recover.

As evidence of his damages the plaintiff offered to prove that an excursion train was expected to arrive with a large number of excursionists at Morehead City on the morning of the 16th of July, and that the plaintiff had engaged passengers for this and his other boats, and had received money to the amount of \$600, which he was compelled to refund.

The defendant objected to the admission of this evidence, and the court rejected so much of it as related to the receipt and repayment of the \$600, but admitted so much as related to the excursion for the purpose of showing that the plaintiff had engaged passengers enough for this and his other boats.

The defendant asked the court to give the jury the following special instructions:

1. That the damages should not exceed the trouble and expense of hiring such a boat as the defendant's at Morehead City wharf, on the arrival of the party.

2. That he could recover only such amount as would cover the

loss he would have suffered, in a fair competition that morning with other boats for the public patronage, irrespective of the forestalling resorted to by him, in the previous engagement of passengers.

3. That the damage should be measured by an indemnity for the moneys actually expended, and a reasonable compensation for work and services performed in preparing for transportation of passengers.

The court, without responding to each instruction asked for, gave a general charge to this effect: The measure of the damages would be only what a boat like the defendant's would be worth at such a time, if they were satisfied that the defendant knew of the excursion and the use the plaintiff intended to put the boat to; as the damages must be such as were in the reasonable contemplation of the parties at the time the contract was entered into; that the defendant was not liable for more than the ordinary earnings of the boat on such occasions, and to arrive at that they could consider the capacity of the boat, the state of the weather and the tide, as well as the evidence that the plaintiff had engaged enough passengers for this and his other boats.

We think these instructions are as favorable to the defendant as he could ask, and are responsive to his prayer for instructions. It is, however, contended by his counsel in this court that the rule of damages laid down by His Honor is incorrect, in that it authorized the jury to assess damages too remote in law. In answer to this it is to be observed that His Honor substantially followed the rule laid down by this court in *Ashe v. DeRosset*, 50 N. C., 299: "Where one violates his contract he is liable only for such damages as are caused by the breach, or such as being incident to the act of omission or commission as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties at the time the contract was made." No safer rule than this has yet been discovered by which to distinguish proximate damages, which may be recovered, from remote damages which may not be, in an action for breach of contract. General rules are in abundance for estimating damages for breach of contract, as that "the amount should be what would have been received if the defendant had kept his contract." *Alden v. Keighly*, 15 M. & W., 117. Or "when a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed." *Robeson v. Harman*, 1 Ex., chs. 855-6. Or, "the true measure of damages is that which will completely indemnify the plaintiff for the breach of the engagement." *Shepherd v. Johnson*, 2 East., 210. All will concede these to be sound equitable

principles, but most cases of contract vary from each other, and whatever general rules there may be for awarding damages, they must be modified by the particular cases to which they come to be applied. None of the above rules afford a criterion for discriminating between remote and proximate damages, and to meet our case, which turned upon the distinction, a more specific instruction was required to restrain the jury from considering remote and conjectural loss on the one hand, and on the other allowing them to estimate the actual loss which followed as an immediate and necessary consequence of the breach of contract.

It was a special occasion, and the contract was made solely in reference to that occasion, and so made known to the defendant at the time of the contract. An excursion train with a large number of passengers seeking amusement or recreation at a summer resort, was expected at Morehead City on the morning of the 16th of July, and to remain for three days in the vicinity. The plaintiff undertook to provide boats for their accommodation, and did engage this boat and passengers to fill it. The immediate and necessary consequence of the failure of the defendant to furnish the boat was the loss to the plaintiff of the fares of the passengers engaged by him for the trip to Beaufort, and excursions in the harbor.

The contract was thus for a specific occasion and specific purpose, and the damage immediately and necessarily follows the breach, and was reasonably contemplated by both parties. The amount of damage incurred was a question for the jury. The defendant, had the fact been so, could have shown in mitigation that the plaintiff hired, or could have hired, other boats in place of his, but he failed to do so, and we must assume that the plaintiff did not provide, and could not reasonably have provided, a substitute for this boat. The actual, immediate and necessary loss was for the jury, and if excessive damages were rendered by their verdict, as it rather appears to us was the case, the remedy was by an application to the judge trying the case for a new trial, because of excessive damages assessed by the jury. This court is precluded from interfering with the action of the court below in matters solely within their discretion.

This case is easily distinguished from *Foard v. Railroad Company*, 53 N. C., 235; *Ashe v. DeRosset*, 53 N. C., 241; *Boyle v. Ruder*, 23 N. C., 607, and *Sledge v. Reid*, 73 N. C. Rep., 440, and similar cases, in that, in those cases the damage was accidental and unforeseen, or merely vague, uncertain and conjectural; and in this they are immediate, necessary and reasonably certain, and such as were in the contemplation of the parties to the contract.

There is no error.

For other cases giving measure of damages, see *Crawford v. Geiser Co.*, 88—554; *Heiser v. Meares*, 120—443; *Buffkin v. Baird*, 73—283; *Gifford v. Betts*, 64—62; *Tanning Co. v. Tel. Co.*, 143—376.

The rule for damages in *Hadley v. Baxendale* is, that the injured party is entitled to such damage as "may fairly and reasonably be considered, either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time the contract was made, as the probable result of it;" if special circumstances are known to both parties, they are supposed to contemplate the injury which would reasonably follow from a breach under such circumstances. *Ashe v. DeRossett*, 50—299; *Spencer v. Hamilton*, 113—49; *Neal v. Hardware Co.*, 122—104; *Herring v. Armwood*, 130—177; *Critchler v. Porter*, 135—548; *Van Lindley v. R. R.*, 88—547; *Williams v. Tel.*, 136—82; *Owen v. Meroney*, 136—475; *Hancock v. Tel. Co.*, 142—163; *Tillinghast v. Cotton Mill*, 143—268; *Lambert v. Express Co.*, 146—321; *Davenport v. R. R.*, 147—503; *Furn. Co. v. Express Co.*, 148—87; *Sloan v. Hart*, 150—269; *Lumber Co. v. R. R.*, 151—23; *Brown v. R. R.*, 154—300; *Peanut Co. v. R. R.*, 155—148; *Penn v. Tel. Co.*, 159—306; *Lumber Co. v. Mfg. Co.*, 162—395; *Underwood v. Car Co.*, 166—458. In breach of contract by defect in engine furnished, special damage may be recovered, as for idle labor, etc., where the delay is caused by the defendant, *Kester v. Miller*, 119—475. In breach of contract by not delivering corn to be ground at plaintiff's mill, the measure is the difference between the cost of grinding and the contract price, *Oldham v. Kerchner*, 79—106, 81—430. For delay in delivering goods, the damage is the difference in the market value at the time delivered and when they should have been delivered. *Spiers v. Halstead*, 74—620; *Hosiery Co. v. Cotton Mills*, 140—452; *Berbarry v. Tombacher*, 162—497; and if no difference, then interest on the money invested. *Mills v. R. R.*, 119—693; *Lee v. R. R.*, 136—522; 5 *Am. & Eng. Encyc.*, 384. In the delay to transport melons, the damage was the value at destination, although the bill of lading stipulated the value at place of shipment as the measure. *McConnell v. R. R.*, 144—87. In breach of contract for sale of coal, partly performed, the seller may recover for amount sold and damages for the breach. *Coal Co. v. Ice Co.*, 134—574. For defect in article, difference in value as received and as it should have been. *Parker v. Fenwick*, 138—209; *Mfg. Co. v. Oil Co.*, 150—150. For explanation of nominal, actual and exemplary damages, see *Hocutt v. Tel. Co.*, 147—p. 191.

Profits and speculative damages.—For breach of contract to exhibit a certain machine, plaintiff may recover costs and expenses, but not for prospective sales. *Machine Co. v. Tobacco Co.*, 141—284; 144—421. Loss of profits can not be considered unless the circumstances are known to the other party; the damage must be the proximate result and not the remote effect. *Jones v. Call*, 96—337; *Kester v. Miller*, 119—476; *Tompkins v. Cotton Mills*, 130—347; *Lumber Co. v. Iron Works*, 130—584; *Sharpe v. R. R.*, 130—613; *Critchler v. Porter*, 135—542; *Allen v. Tompkins*, 136—210; *Johnson v. R. R.*, 140—574; *Mfg. Co. v. Machine Works*, 144—689; *Hawk v. Lumber Co.*, 149—10; *Wilkinson v. Dunbar*, 149—20; *Bell v. Machine Co.*, 150—111; *Coles v. Lumber Co.*, 150—183; *Steel Co. v. Copeland*, 159—556; *Wells v. Nat. L. Association*, 99 *Fed.*, 222, 53 *L. R. A.*, 33. Where defendant sold seed rice to plaintiff, which failed to come up, plaintiff could recover the price paid for the rice, the expense of preparing the ground and planting, and it being too late for another crop, a reasonable rent for the land, to be diminished by anything the defendant may show that the plaintiff might have made out of the land. *Riger v. Worth*, 127—230; 52 *L. R. A.*, 362, and cases cited; *Leonard Seed Co. v. Crary Canning Co.*, 147 *Wis.*, 166, 132 *N. W.*, 902, 37 *L. R. A. (N. S.)*, 85.

Plaintiff must use reasonable diligence to prevent loss, and if no loss follows the breach he is entitled to nominal damages. *Hassard-Short v. Hardison*, 114—482; *State v. Skinner*, 25—564; *Mfg. Co. v. Machine Works*, 144—689; *Bowen v. King*, 146—p. 391; *Fertilizer Co. v. McLawhorn*, 158—274.

In telegraph cases mental anguish may be considered as an element of damage in some States. *Young v. Tel. Co.*, 107—370; *Green v. Tel. Co.*, 136—489; *Mord. & Mc. Rem.*, 403-405. It is sometimes said that in such cases the action must be in contract rather than in tort, since the nature of the message indicates that peculiar damage will result, but in N. C. it is held that the action may be in tort or in contract. *Thomason v. Hackney*, 159—299; *Penn v. Tel.*, 159—306.

Punitive damages will not be allowed for breach of contract, except in breach of promise of marriage. *Richardson v. R. R.*, 126—100; *Allen v. Baker*, 86—91; *Baumle v. Verde*, 124 Pac., 1083, 41 L. R. A. (N. S.), 846. For damages generally, see 8 R. C. L., 427, 442, 455, 492; 13 Cyc., 17, 32, 39, 49, 71.

Sec. 2. Specific performance.

(270) PADDOCK v. DAVENPORT,

107 N. C., 710, 12 S. E., 464—1890.

The facts in this case are given in (24) *ante*.

SHEPHERD, J. . . . The second cause of action is for specific performance, both against Davenport, who executed the contract, and Thrash, who purchased of him with notice of the claim of the plaintiff.

The true principle upon which specific performance is decreed does not rest, in all cases, simply upon a mere arbitrary distinction as to different species of property, but it is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon (1) where there is a peculiar value attached to the subject of the contract which is not compensable in damages. The law assumes land to be of this character "simply because" (says *Pearson, J.*, in *Kitchen v. Herring*, 42 N. C., 191), "it is land, a favorite and favored subject in England and every country of Anglo-Saxon origin." The law also attaches a peculiar value to ancient family pictures, titles, deeds, valuable paintings, articles of unusual beauty, rarity and distinction, such as objects of *virtu*. A horn, which time out of mind had gone along with an estate, and an old silver patera, bearing a Greek inscription and dedicated to Hercules, were held to be proper subjects of specific performance. These, said Lord Eldon, turned upon the *pretium affectionis*, which could not be estimated in damages. So for a faithful slave, endeared by a long course of service or early association, Chief Justice *Taylor* remarked that "no damages can compensate; for there is no standard by which the price of the affections can be adjusted and no scale to graduate the feelings of the heart." *Williams v. Howard*, 7 N. C., 74.

This principle is also applied (2) where the damages at law are so uncertain and unascertainable, owing to the nature of the property or the circumstances of the case, that a specific performance

is indispensable to justice. Such was formerly held as to the shares in a railroad company, which differ, it was said, from the funded debt of the government in not always being in the market and having a specific value. Also a patent (34 Conn., 325), and a contract to insure (4 Sanf., ch. 408), and like cases. The general principle everywhere recognized, however, is that except in cases falling within the foregoing principles, a court of equity will not decree the specific performance of contracts for personal property; "for," remarks *Pearson, J.*, in *Kitchen v. Herring*, *supra*, "if with money an article of the same description can be bought . . . the remedy at law is adequate." See also *Pomeroy Spec. Perf.*, 14.

Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the exercise of the equitable power of the court. The trees were purchased with a view to their severance from the soil and thus being converted into personalty. It is not shown that they have any peculiar value to the plaintiff, nor does there appear any circumstance from which it may be inferred that the breach of the contract may not be readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce at the contract price. The simple fact that they are near a watercourse does not alter the case, for the conveniences of transportation are elements which may be considered in the estimation of damages. Neither is the circumstance that the plaintiff purchased a "few trees of like kind" in the vicinity, sufficient to warrant the equitable intervention of the court. We can very easily conceive of cases in which contracts of this kind may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the court, as to this branch of the case, is sustained.

Specific performance is not a strict right of the party, but rests in the sound discretion of the court, to determine whether or not it should be granted, *Herren v. Rich*, 95—500; *Boles v. Caudle*, 133—528. It is a purely equitable remedy, and the essentials as given in *Adams Equity*, 77, are: (1) The contract must be for a valuable consideration; (2) the mutual enforcement must be practicable, that is, something that the defendant can do, and the court can enforce; (3) it must be necessary, that is, important to the plaintiff, and not oppressive to the defendant. See *May v. Getty*, 140—310; *Timber Co. v. Wilson*, 151—154; *Rudisill v. Whitener*, 146—403; *Cuddee v. Rutter*, 1 P. Wms., 570, 6 E. R. C., 640; *Mord. & Mc. Rem.*, 608; specific performance may also be granted with compensation for defects. *Bethell v. McKinney*, 164—71; *Mord. & Mc. Rem.*, 313; *Bisph. Eq.*, sec. 388; *Joyner v. Crisp*, 158—199.

Sec. 3. By injunction.

COWAN v. FAIRBROTHER,

118 N. C., 486, *ante* (167).

This is an indirect way of obtaining specific performance by restraining the defendant from breaking his contract. *Harris v. Theus*, 149 Ala., 133, 43 So., 131, 10 L. R. A. (N. S.), 204, Rem., 710; *Phila. Ball Club v. Lajoie*, 202 Pa., 210, 51 Atl., 973, 58 L. R. A., 227, Rem., 712; *Lumley v. Wagner*, 21 L. J. Ch., 898, 6 E. R. C., 652; *Guilford v. Porter*, 167—366.

Sec. 4. Discharge of right of action for breach.

1. By release.

(271) STINSON v. MOODY,

48 N. C., 53—1855.

The plaintiff declared on a bond of \$258, to make title to a certain tract of land. The defendant pleaded general issue, conditions performed, and a release since the last continuance. To sustain the plea of "release," the defendant introduced a writing under seal, beginning "Contract, compromise, and reconveyance between W. R. Stinson and A. S. Moody," in which Stinson agrees to dismiss his suit against Moody, and pay the cost; to sell to Moody the land for which he held bond for title, "which title bond the said Stinson agrees and binds himself to surrender and deliver up to said Moody."

His Honor charged the jury that the deed offered in evidence did not sustain the plea of release. Judgment for plaintiff, and defendant appealed.

BATTLE, J. (After discussing the question of payment involved.) The last objection urged against the plaintiff's right to recover is of a different character, and we are unable to discover any ground upon which it can be resisted. We lay no stress upon that part of the instrument pleaded *puis d'avin continuance*, which purports to be a reconveyance of the plaintiff's interest in the land, but we do not see how the agreement under seal to dismiss the suit, pay the costs, and surrender the bond sued upon, can be construed to be anything else than a release. A release is said to be "when a man quits or renounces that which he before had." 7 Com. Dig. Tit. Release, Letter A. It may be by express words, or by act in law. When it is by express words, it does not require any particular word; so that "remise," "quitclaim," "renounces," "acquits," etc., will have the same effect as the word "release." Co. Lit., 264b. If lessor grants that his lessee shall be discharged

of his rent, this amounts to a release of the rent. So, if a man acknowledges himself to be satisfied and discharged of all bonds, etc., by the obligor, it amounts to a release of the bond. So, if one covenant that he will never sue for a debt, this amounts to a release. See 7 Com. Dig., *ubi supra*, and the cases there cited. In *Dean v. Newhall*, 8 Term Rep., 168, it was decided that where an obligee covenanted not to sue one of two joint and several obligors, and that if he did, the deed of covenant might be pleaded in bar, he might sue the other obligor. But it was said, in the same case, that a covenant not to sue a single obligor might be pleaded as a release, to avoid a circuity of action. This principle must necessarily embrace our case. An agreement under seal to dismiss a suit then pending, to pay the cost, and to surrender up the bond upon which the action is brought, must, to avoid circuity of action, be construed to be a release of the action. The judgment of the court below is reversed, and *venire de novo* awarded.

See *Adams v. Battle*, 125—152; *May v. Getty*, 140—310; *Lowe v. Weatherly*, 20—353. For fraud and mistake in release, see *Bean v. R. R.*, 107—731; *Wright v. R. R.*, 125—1; *Boutten v. R. R.*, 128—337; *Dorsett v. Mfg. Co.*, 131—254; *Moore v. Casualty Co.*, 150—153; *Pollock Cont.*, 812; 34 Cyc., 1045.

2. Accord and satisfaction.

(272) ELAM v. BARNES,

110 N. C., 73, 14 S. E., 621—1892.

CLARK, J. . . . Upon looking into the pleadings, we find that the complaint alleged the purchase of certain tobacco by the plaintiff of the defendant, which the latter afterward refused to deliver, whereupon the plaintiff took out claim and delivery proceedings, and while under such proceedings the tobacco was in the sheriff's hands, the complaint alleges that the defendant made an offer to the plaintiff to settle the matter on a specific basis, "and that all matters in the controversy between them should be thereby settled." It is further alleged that the plaintiff accepted the offer, and that the terms thereof were fully complied with. Notwithstanding all which, the plaintiff still brings this action for alleged damage to the tobacco by its being hauled and rehailed and loaded and unloaded when the defendant was resisting the plaintiff's claim to possession of the tobacco, all of which was prior to the compromise and settlement by which it is alleged in the complaint that it was agreed "that all matters in controversy between them should be thereby settled."

Compliance with such settlement is averred, and no cause of action is set out which arose subsequent thereto. It is true that it is alleged that the defendant has brought suit against one George

B. Harris, who was surety to the plaintiff for the payment of the purchase money of the tobacco, for an alleged deficiency in the amount by the original contract agreed to be paid. If so, the above-alleged agreement of compromise and full settlement between the plaintiff and the defendant can be pleaded in bar to such action. The fact that the defendant has brought such action does not invalidate and set aside the compromise and settlement so as to entitle the plaintiff to maintain an action which upon his own averments is barred by the compromise and settlement. Let it be entered that the action is

Dismissed.

See cases under part payment in satisfaction. To maintain the plea of accord and satisfaction, there must be not only an agreement and readiness of the defendant, but actual acceptance by the plaintiff. *Bank v. Littlejohn*, 18—563; 1 Am. & Eng. Encyc., 408 *et seq.*; *Jaffray v. Davis*, 124 N. Y., 164, 26 N. E., 351, 11 L. R. A., 712; *Shubert v. Rosenberger*, 204 Fed., 934, 45 L. R. A. (N. S.), 1062; *Manley v. Vt. F. Ins. Co.*, 78 Vt., 331, 6 Ann. Cas., 562; 1 R. C. L., 177; 1 Cyc., 311; *Mord. & Mc. Rem.*, 88.

3. By arbitration and award.

(273) WILLIAMS v. MANUFACTURING CO.,

153 N. C., 7, 68 S. E., 902—1910.

BROWN, J. It is unnecessary to review the conclusions of the Superior Court that the provision in the contract agreeing to submit all matters of difference to arbitration is no bar to this action, for the reason that the plaintiffs and defendant did voluntarily submit such matters to arbitration in manner and form as provided in the contract and the arbitrators in due time rendered their award. It is common learning that a valid award operates as a final and conclusive judgment, as between the parties to the submission, or within the jurisdiction of the arbitrators, respecting all matters determined and disposed of by it.

But it is contended that the fact that a summons in this action was issued some days before the rendering of the award revoked the submission, and deprived the arbitrators of the right to make an award. No other form of revocation is contended for.

At common law a submission might be revoked by any party thereto at any time before the award was rendered. *Bacon Abridg.*, Arb. B; *Comyns Dig.*, Arb. D, 5; *Vinyor's Case*, 8 Coke, 82. Some of the courts of this country have held to the contrary (*Berry v. Carter*, 19 Kans., 135, and cases cited), but this court has followed the doctrine of the common law. *Tyson v. Robinson*, 25 N. C., 333; *Carpenter v. Tucker*, 98 N. C., 316. The revocation must be express unless there is a revocation by implication of law, and in case of express revocation, in order to make it complete, notice must be given to the arbitrators. It is ineffective

until this has been done. *Allen v. Watson*, 10 Johns., 205; *Brown v. Leavitt*, 96 Me., 251; *Morse on Arb. and Award*, 231; *Vin. Ab., Authority E.*, 3, 4; *Vinyor's Case, supra*; 2 Am. & Eng., 600.

It is contended that commencing an action is a revocation by legal implication. Such revocations arise from the legal effect of some intervening happening after submission, either by the act of God or caused by the party, and which necessarily puts an end to the business. The death of a party, or arbitrator, marriage of a *feme sole*, lunacy of a party, or the utter destruction and final end of the subject-matter, are of this description. But whether the bringing of an action for the subject-matter of an arbitration after submission and before award is an implied revocation, is a matter about which the courts differ.

In New York it is held that it is no revocation in law (*Lumber Co. v. Schneider*, 1 N. Y. Supp., 441; *Smith v. Bard*, 20 Barb., 262). To the same effect are the decisions in New Jersey and Vermont (*Knores v. Jenkins*, 40 N. J. L., 288; *Sutton v. Tyrrell*, 10 Vt., 91). The courts of Kentucky, Illinois, Georgia and New Hampshire hold the contrary. (*Peters v. Craig*, 6 Dan., 307; *Paulser v. Manske*, 24 Ill. App., 95; *Leonard v. House*, 15 Ga., 473; *Kimball v. Gilman*, 60 N. H., 54.) . . . Nevertheless it is plainly deducible from all the cases that the action when commenced must cover the subject-matter submitted to arbitration; otherwise it can not be construed as a revocation or notice to the party or to the arbitrators.

In the case at bar the summons was issued some days before the award was made, but the complaint was not filed until a year after. The summons gave no indication as to the character of the action except that it was a civil action. Until a complaint is filed the defendant has no legal notice of the cause of action and the arbitrators had a right to proceed with the pending arbitration and to render their award. . . . In their written award the arbitrators appear to have carefully confined themselves to the questions submitted and to have confined their findings to the four matters in dispute. But it is unnecessary to discuss that contention further, as it is expressly admitted in the case agreed that the arbitrators, on 25 January, 1907, rendered their award, "passing on the matters submitted to them." In view of this admission in the record it is not now open to the plaintiff to attack the award.

Judgment reversed.

See this case and notes in 138 A. S. R., 637, 21 Ann. Cas., 954, and 31 L. R. A. (N. S.), 679; also in 154—203. "A submission to arbitration may be defined as an agreement by which parties refer disputed or doubtful matters pending between them to the final decision and award of another party, whether one person or more; the party to whom the reference is made is called an arbitrator, the arbitration is the investigation and determination of the matters of difference between the contending parties by the arbitrator

so chosen and the award is the decree or judgment of the arbitrator and is generally conclusive in its effect." *Millsaps v. Estes*, 137—p. 539, citing 2 Am. & Eng. Encyc., 539, and *Morse on Arbitration*, 36. See also *Robertson v. Marshall*, 155—167; *Peele v. R. R.*, 159—60; *Sprinkle v. Sprinkle*, 159—81; *Millinery Co. v. Ins. Co.*, 160—139; 2 R. C. L., 386; 3 Cyc., 728; 2 Am. & Eng. Encyc., 794; *Mord. & Mc. Rem.*, 90.

4. By judgment.

(274) WINSLOW v. STOKES,

48 N. C., 285, 67 A. D., 242—1856.

Action on a written covenant in relation to the management of a sawmill. The pleas were covenants performed, former suit, and recovery for the same cause of action.

It appeared upon the trial below that a former suit had been brought upon the instrument in question, and the same breaches assigned as in the present case; also, that the plaintiff had recovered damages for these breaches, and had received satisfaction for the same before this suit was brought.

Upon an intimation from His Honor that this appeared to be a full answer to the suit, the plaintiffs offered to show that the jury on the former trial were instructed by the court to give damages up to the time of the trial, and for no longer time; but His Honor being of opinion that this would not alter the case, refused the testimony, and the plaintiffs excepted.

Verdict and judgment for the defendant, and appeal by the plaintiffs.

BATTLE, J. The recovery in the former suit upon the same covenant in which the same breaches were assigned was, we think, a bar to the present action, and His Honor properly ruled out the testimony which was offered to show that full damages were not then given. The covenant was, in the particulars mentioned, one and indivisible, and upon a breach of it, the plaintiffs were entitled to the whole amount of damages, present and prospective, caused by such breach. If the damages were restricted in consequence of instructions from the court, it was an error which the plaintiffs, by taking the proper steps, might have had corrected in that action. Their omission to do so can not give them the right to harass the defendant with the expense and trouble of another suit. For the distinction between the cases where prospective damages, that is, such as have accrued since the commencement of the suit, may, and where they can not, be given, see the case of *Moore v. Love*, decided at the last term, and reported *ante*, 215 (48—215), in which the subject is fully discussed.

Per Curiam.

Judgment affirmed.

Estoppel and res judicata.—A judgment of a court having jurisdiction estops parties and privies. 44—p. 161; 85—456; 99—258; 128—130. The judgment is decisive of the points raised in the pleadings, or which might properly be predicated upon them; but not as to matters which might have been brought in, but in fact were not embraced in the litigation. 144—516; 140—18; 140—437; 140—503; 125—64; 119—460; 117—181; 91—82; 91—322; *Clothing Co. v. Hay*, 163—495; *Ferebee v. Sawyer*, 167—199.

"Splitting up" accounts.—Where the items are distinct dealings, though they may be contained in a "running account," they may be separated, and different actions brought so as to give a justice of the peace jurisdiction, but they may afterwards be consolidated by order of court, *Caldwell v. Beatty*, 69—p. 370; *Boyle v. Robbins*, 71—130; but where there is an account stated or rendered and not objected to, it becomes one debt and can not be separated, or where the items constitute one dealing, *Hawkins v. Long*, 74—781; *McGruder v. Randolph*, 77—79; *Waldo v. Jolly*, 49—173; *Gooch v. Vaughan*, 92—610; *Kearns v. Heitman*, 104—332; *Marks v. Ballance*, 113—28; *Simpson v. Elwood*, 114—528; *Cotton Mills v. Cotton Mills*, 115—475; *Fort v. Penny*, 122—230; *Norvelle v. Mecke*, 127—400; *Copeland v. Tel. Co.*, 136—11; *McPhail v. Johnson*, 109—571; a judgment on part would exclude further recovery, *Jarrett v. Self*, 90—478; *Smith v. Lumber Co.*, 140—375, 142—26. See *Moore v. Nowell*, 94—265; *Mord. & McL. Rem.*, 673. For the different views taken on the subject, see 24 *Am. & Eng. Encyc.*, 786 *et seq.* A mortgagee may bring an action for part of the articles included in his mortgage. *Kiser v. Blanton*, 123—400.

5. By statute of limitations.

(275) HUSSEY v. KIRKMAN,

95 N. C., 63—1886.

Civil action by plaintiff against the defendant as administrator of John Woods, for the sum of \$54.50 due by note, alleged to have been lost. The note was alleged to have been executed in June, 1875, and the action was brought in April, 1884. Defendant denied plaintiff's allegations and set up the statute of limitations as a defense.

One Cullen Woods testified that about two months before the death of the intestate, he heard him say that he owed the plaintiff near the sum of \$60, "that it was just and due, and he intended to pay it if he ever got well enough." Plaintiff testified that the signature to the note was in the handwriting of John Woods, and proposed to prove the contents, but defendant objected, and the objection was sustained.

The judge held that there was no evidence to go to the jury, and plaintiff submitted to nonsuit and appealed.

SMITH, C. J. (After discussing the evidence under sec. 590 of The Code.) Upon the received evidence, it does not appear when the note was made, nor when it matured; and when the statutory bar is set up, it devolves on the plaintiff to show that the cause of action accrued within the time limited for bringing it.

If the note was made previous to the time when The Code of Civil Procedure went into effect, there would be no limited time

for instituting suit, but only a presumption of payment raised by the lapse of time. If made and maturing on or after April 8, 1874, the limitations in the present law would not have expired before the issue of the summons. The Code, sec. 132, par. 2.

If it was executed and became due within the interval thus marked, the statutory bar would protect the intestate. The plaintiff did not show when the note was given, and when the cause of action accrued.

To meet this difficulty, we suppose the intestate's admissions of his indebtedness were given in evidence, and the inquiry is, were they sufficient to remove the bar?

The admission is, that the intestate owed a note to the plaintiff of about sixty dollars, which had been renewed.

The trouble is, that no note has been produced, nor its contents shown, to which the admissions can be attached, so as to admit of identification.

The acknowledgment is very like that in *Faison v. Bowden*, 72 N. C., 405, in which the testator said to the plaintiff, "I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I have now for building, and it will do you more good to get it in a lump." The testator owed the plaintiff for medical services, running over a period from the beginning of 1854 until his death, in November, 1861, and the recognition of the debt was relied on to remove the bar as to the whole account.

It was held to be insufficient, and *Reade, J.*, for the court, says: "The rule to be gathered from the numerous cases, to which we were referred by the counsel, may be thus expressed: The new promise must be definite and show the nature and amount of the debt, or must distinctly refer to some writing, or to some other means by which the amount and nature of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied."

Again, it has been held that the promise must be made to the creditor himself (*Parker v. Shuford*, 76 N. C., 219, and *Faison v. Bowden*, *Ibid.*, 124), or to an attorney or agent for the creditor (*Kirby v. Mills*, 78 N. C., 124), to repel the statute.

If, however, the note was executed since The Code of Civil Procedure became the law (and the time is not shown), the promise or acknowledgment must be in writing (The Code, sec. 172), and if before, there is no statutory limitation applicable.

The ruling of the court, that there was no evidence before the jury to warrant a verdict for the plaintiff, must therefore be sustained.

Judgment.—Action on Superior Court judgment is barred in ten years. Rev., 391; Clark's Code, sec. 152; but it must be a final judgment. Williams

v. McFadyen, 145—156; a void judgment does not affect the rights of the party. Card v. Finch, 142—140; the statute also applies to a foreign judgment. Arrington v. Arrington, 127—190. A justice's judgment is barred in seven years, Rev., 392; but it may be docketed in the Superior Court and be enforced by execution within ten years. Rev., 1479; McIlhenny v. Trust Co., 108—311. The running of the statute is suspended by allotment of the homestead, during the continuance of the homestead. Rev., 685; Bevan v. Ellis, 121—224; Farrar v. Harper, 133—71; Wells v. Lumber Co., 131—161; Formyduvall v. Rockwell, 117—320; whether a conveyance of the homestead, which now removes the exemption (Rev., 686), would cause the statute to run again, *quaere?*

Contract under seal.—Action is barred as to the principal in ten years. Rev., 391; Clark's Code, sec. 152. A mortgage is barred as to foreclosure, redemption and sale, in ten years. Rev., 391; Clark's Code, 152. The debt may be barred in three years, if not under seal, and the mortgage still be enforced. Jenkins v. Wilkinson, 113—532; Hedrick v. Byerly, 119—420; and it was held in Menzell v. Hinton, 132—660, that the debt and right of foreclosure by suit might be barred, and yet the power of sale be exercised; see also Cone v. Hyatt, 132—810; Miller v. Coxe, 133—578; but this was changed by Rev., 1044. A second mortgagee can not have a first mortgage canceled because it is barred. Miller v. Coxe, 133—578. The statute begins to run from the time the debt is due, and the mortgagee may sell within ten years from that time, although he might have foreclosed before that time for failure to pay interest. Cone v. Hyatt, 132—810; Scott v. Lumber Co., 144—44.

A surety on a sealed instrument is protected by the three-years statute, and he may show by parol that he is surety, as stated in Lewis v. Long, 102—206; Clark's Code, secs. 152 (2), 155 (1); see also Welfare v. Thompson, 83—276; Capell v. Long, 84—17; Coffey v. Rinehart, 114—509; but a mortgage executed by the surety is good for ten years. Miller v. Coxe, 133—578. A surety on a guardian bond is protected in three years after breach, or from a demand for an account and a refusal; in six years if final account is filed; in ten years if no account is filed and no demand is made. Kennedy v. Cromwell, 108—1; Self v. Shugart, 135—185.

Simple contracts.—The action is barred in three years after the cause of action accrues. Rev. 395; Clark's Code, secs. 152, 155; but claims against counties, cities and town are barred in two years. Rev., 396; Board v. Greenville, 132—4, 137—503.

Accounts.—In a mutual, open and current account, where there have been reciprocal demands between the parties, the statute runs from the last item. Rev., 376; Green v. Caldcleugh, 18—320; Waldo v. Jolly, 49—173; Hussey v. Burgwyn, 51—385; Mauney v. Coit, 86—463; Robertson v. Pickrell, 77—302; Stokes v. Taylor, 104—394; Fulps v. Mock, 108—601; if the accounts are not mutual, the statute runs from each item, as when services are rendered for a series of years without any agreement as to duration, the statute runs from the end of each year. Miller v. Lash, 85—51.

Fraud or mistake.—Action may be brought within three years from the discovery of the facts constituting the fraud or mistake. Rev., 395; Clark's Code, sec. 152; or when they could have been discovered by reasonable care. Stubbs v. Motz, 113—458; Hooker v. Worthington, 134—283; Peacock v. Barnes, 142—215; Modlin v. R. R., 145—219; it runs from the discovery of the fraud and not from the discovery of the plaintiff's rights. Bonner v. Stotesbury, 139—3.

Running of the statute.—The time is counted from the time the cause of action accrues, that is, when the action could have been brought. Rev., 360; Clark's Code, sec. 138. But if at the time the cause of action accrues the party entitled is under the disability of infancy, insanity, or imprisonment for crime, he may sue within the time limited after the disability is removed. Rev., 362; Clark's Code, sec. 163; Outland v. Outland, 118—138; Asbury v. Fair, 111—251; Grady v. Wilson, 115—344; Earnhardt v. Clement, 137—91; Self v. Shugart, 135—185.

The statute does not run in favor of a nonresident, or a defendant out of

the State. Rev., 366; *Green v. Ins. Co.*, 139—309; *Alpha Mills v. Engine Co.*, 116—797; *Lee v. McKoy*, 118—518; *Clark's Code*, sec. 162.

Upon the death of a person his personal representative may sue within one year after the death; and an action may be brought against such representative within one year after issuing of letters, provided administration is begun within ten years. Revisal, 367; *Clark's Code*, sec. 164; *Coppersmith v. Wilson*, 107—31; *Benson v. Bennett*, 112—505; *Winslow v. Benton*, 130—58; *Phifer v. Ford*, 130—208; *Lowder v. Hathcock*, 150—438; *Mathews v. Peterson*, 150—134. But a claim presented to an administrator and rejected by him, must be sued on within six months thereafter. Rev., 1903; *Morrissey v. Hill*, 142—355.

The time of the stay of proceedings by injunction, or of a controversy about the probate of a will or the granting of letters of administration, will not be counted. Rev., 368, 369; and a new action may be brought within one year after nonsuit, reversal or arrest of judgment. Rev., 370; *Clark's Code*, sec. 166, and cases cited; *Meekins v. R. R.*, 131—1.

For undisclosed partner, from the time he is known. Rev., 373. The statute also applies to claims by the State. Rev., 375.

New promise.—A new promise in writing will revive the debt. Rev., 371; *Clark's Code*, sec. 172; *Rich v. Herren*, 95—388; *Royster v. Farrell*, 115—306; *Cecil v. Henderson*, 121—244; it must be certain in terms or refer to something that will make it certain. *Long v. Oxford*, 104—408; a mere acknowledgment is not sufficient; it must be an unconditional promise to pay. *Helm v. Griffin*, 112—356; *Wells v. Hill*, 118—900; *McBride v. Gray*, 14—120; *Smallwood v. Smallwood*, 19—330; *Mastin v. Waugh*, 19—517; *Taylor v. Stedman*, 33—347; *Moore v. Hyman*, 35—272; it must be made to the creditor or his agent. *Parker v. Shuford*, 76—219; and the action is upon the original contract as between the original parties, otherwise upon the new promise. *Fleming v. Staton*, 74—203; *Thompson v. Gilreath*, 48—293; now it is upon the original promise except in special case, as to pay an executor, or to pay in specific articles. *King v. Phillips*, 94—555; *Cecil v. Henderson*, 121—p. 246. "I propose to settle your claim" is sufficient. *Taylor v. Miller*, 113—340; that "he would see the judge and do what he said," is not sufficient. *Grady v. Wilson*, 115—344. An acknowledgment by a partner after dissolution will bind only himself. Rev., 372.

Part payment will extend the time from the date of the payment, or revive the debt if barred. Rev., 371; *Clark's Code*, sec. 172, and cases cited; *Copeland v. Collins*, 122—619; *Moore v. Carr*, 123—425; *LeDuc v. Butler*, 112—458; *Williams v. Kerr*, 113—306; but it must be such a payment as to recognize the debt and its continued obligation. *Battle v. Battle*, 116—161; *Cone v. Hyatt*, 132—803; *Robinson v. McDowell*, 133—182. Part payment by the principal before the debt is barred, operates to continue the obligation as to himself and the sureties, but not as to endorsers; a payment after the debt is barred revives it only as to the one making the payment. *Moore v. Godwin*, 109—218; *Moore v. Beaman*, 111—328; *Garrett v. Reeves*, 125—529; *Supply Co. v. Dowd*, 146—191; *Bank v. Hamrick*, 162—216; *Houser v. Faysoux*, 168—1. A payment or a new promise on a judgment does not keep it in force. *Hughes v. Boone*, 114—54; *McCaskill v. McKinnon*, 121—192; *McDonald v. Dickson*, 87—404.

A promise not to plead the statute will estop the party. *Raby v. Stuman*, 127—463; *Haymore v. Comrs.*, 85—268; *Cecil v. Henderson*, 121—244; *Joyner v. Massey*, 97—148; *Barcroft v. Roberts*, 91—363; a mere request not to sue is not sufficient; it must be an agreement not to plead the statute. *Hill v. Hilliard*, 103—34. As to delay in contract for land, see *Hairston v. Bescherer*, 141—205.

Effect of the statute.—The statute bars the remedy but does not discharge the debt. *Campbell v. Holt*, 115 U. S., 620; *Capehart v. Dettrick*, 91—344; *Alpha Mills v. Engine Co.*, 116—797; *Hedrick v. Byerly*, 119—420; *Scott v. Lumber Co.*, 144—44; *Clark's Code*, sec. 152 (3), and cases cited.

Before 1868 there was a statute of presumptions, which could be rebutted

by showing insolvency, etc. *Campbell v. Brown*, 88—376; *Alston v. Hawkins*, 105—3; *Boone v. Peebles*, 126—826.

Change of statute.—The Legislature may change the statute by extending or shortening the time, subject to the restriction that where the time is reduced “a reasonable time must be given for the commencement of an action before the statute works a bar.” *Strickland v. Draughan*, 91—103; *Nichols v. R. R.*, 120—495; *Culbreth v. Downing*, 121—206; *Dunn v. Beaman*, 126—766; *Carson v. R. R.*, 128—95; *Mathews v. Peterson*, 150—132.

Conflict of laws.—In regard to the merits and rights involved in actions, the law of the place where they originate is to govern; but all forms of remedies and judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act. *Haws v. Craigie*, 49—394, citing *Story's Conf. of Laws*, sec. 558; 9 *Cyc.*, 664; *Minor's Conf. of Laws*, 521. As to the statute of limitations on foreign judgments, the *lex fori* will apply. *Arrington v. Arrington*, 127—190.

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